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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-949

MARY AKIN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. INTRODUCTION

Petitioners,[1] approximately twelve hundred Colorado citizens, a number of public entities,[2] and the State of Colorado, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on October 2, 1974.

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[1] These petitioners are named in the Complaint of the United States filed in the United States District Court for the District of Colorado in this action. This complaint is attached in the appendix to the Petition for Writ of Certiorari filed separately by the Colorado River Water Conservation District, the Southwestern Water Conservation District and other intervening defendants.

[2] The Colorado State Board of Agriculture, the Colorado Game and Fish Commission (Colorado Wildlife Commission and Colorado Board of Parks and Outdoor Recreation), the Board of Water Commissioners of the City and County of Denver, the Mancos Water Conservancy District, and the Southeastern Colorado Water Conservancy District.

II. OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 504 F.2d 115 (1974) and is attached hereto as Appendix A. No written opinion was issued by the United States District Court for the District of Colorado in this case. A transcript of the District Court's oral findings of fact and conclusions of law is attached hereto as Appendix B.

III. GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was entered on October 2, 1974. A timely petition for rehearing *en banc* was filed by several of the petitioners and was denied on November 12, 1974. This Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IV. QUESTION PRESENTED

Whether the Court of Appeals erred in overriding the discretionary determination of the District Court to abstain from exercising jurisdiction to adjudicate reserved and other water rights claimed by the United States within a Colorado river basin when a state court action is pending to determine water rights in the same river system and the United States has been joined in such action pursuant to the McCarran Amendment (43 U.S.C. § 666).

V. STATUTORY PROVISIONS INVOLVED

The federal statutory provision involved is 43 U.S.C. § 666, 66 Stat. 560, commonly referred to as the McCarran Amendment:

> 666. *Suit against the United States.*—(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of

rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, that no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of the States to the use of the water of any interstate stream. (July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.)

The state statute involved is the Water Right Determination and Administration Act of 1969, Colorado Revised Statutes 1973, 37-92-101, *et seq.*, as amended, which provides a comprehensive system for the adjudication and administration of all waters within the State of Colorado. Sections 37-92-201, 203 and 204 which establish the water divisions and provide for the appointment, jurisdiction and

powers of water judges and water clerks and 37-92-301 to 306, which set forth the essential water right determination and administration provisions, are attached hereto as Appendix C.

VI. STATEMENT OF THE CASE

This is a water rights case concerning the proper forum for the adjudication of claims for water rights in the San Juan River Basin in Colorado. Respondent United States instituted this action on November 14, 1972, in the United States District Court for the District of Colorado and invoked jurisdiction under 28 U.S.C. § 1345, which grants jurisdiction to district courts of all civil actions commenced by the United States except as otherwise provided by Act of Congress. The action was brought on behalf of the United States in its own capacity and as trustee for the Ute Mountain Ute and Southern Ute Indian tribes for all water rights it claims in the San Juan River Basin in Colorado. Included in this action are claims for reserved water rights as well as water rights based upon the appropriation and utilization of water. The relief sought was an adjudication of the respective rights and priorities in the diversion of water and the appointment of a Water Master by the Federal District Court to administer the adjudication.

The United States has asserted reserved water rights in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation projects within Colorado, and other lands reserved by the United States including reservations for the Ute Mountain Ute and Southern Ute Indian tribes within the State of Colorado.

This action is against approximately twelve hundred named defendants and all unknown claimants of interest in

the waters in question. The Colorado River Water Conservation District, the Board of Water Commissioners of the City and County of Denver, the Southwestern Water Conservation District, the Mancos Water Conservancy District, and the Southeastern Colorado Water Conservancy District intervened in the action on the ground that their various appropriative rights and conservation projects would be directly affected by an adjudication of water rights as claimed by the United States. Subsequently, the Native American Rights Fund filed a brief on behalf of amici curiae Southern Ute Indian tribe, Ute Mountain Ute Indian tribe and the National Tribal Chairmen's Association.

On January 3, 1973, an action was commenced in state court (Water Division 7) which embraced the identical water right claims which the United States was advancing in federal court. The Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States pursuant to 43 U.S.C. § 666 (the McCarran Amendment) which permits the joinder of the United States in such adjudications of water rights. The United States is also a party to water right proceedings in seven other state water court actions and is adjudicating their claims in accord with Colorado's Water Right Determination and Administration Act of 1969.

On motion of various defendents and intervenors to dismiss the complaint for lack of jurisdiction and on grounds of abstention and comity, the United States District Court for the District of Colorado on June 21, 1973 determined that by reason of the existence of an extensive state water right machinery, the avoidance of a duplicative and piecemeal adjudication of federal water claims, the Congressional intent expressed by the McCarran Amendment and acknowledged in *United States v. District Court*

in and for the County of Eagle, 401 U.S. 520 (1971), and the principles of abstention and comity, the federal court should not exercise jurisdiction in this case. Reconsideration was denied by the District Court on August 22, 1973, and the United States prosecuted an appeal of the dismissal to the United States Court of Appeals for the Tenth Circuit.

On October 2, 1974, the Court of Appeals reversed the judgment of the District Court, holding that (i) the District Court was not divested of jurisdiction to entertain the claims of the United States by 43 U.S.C. § 666 (the McCarran Amendment) and (ii) the application of the doctrine of abstention was erroneous because it did not fall within one of the three cited categories in which the doctrine was said to apply. On November 12, 1974, the Court of Appeals denied a petition for rehearing *en banc*. (Judges Holloway and Barrett would have granted an *en banc* rehearing).

VII. REASONS FOR GRANTING THE WRIT

The questions presented in this case are basic ones of federalism that have been resolved by this Court and by Congress in a manner totally opposed to the holding of the Court of Appeals. At stake is the orderly adjudication and administration of water rights in a state where water is a precious natural resource. The decision of the Court of Appeals emasculates a fundamental policy, heretofore acknowledged by Congress and this Court, that water rights are relative and interdependent and must be adjudicated in a single forum. It presents a significant question of federal law regarding the rights of state courts to adjudicate claims for federal reserved rights that should be resolved by this Court compatibly with its decision in *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971) (hereinafter *Eagle County*).

The decision below does violence to notions of sound judicial administration and economy, as well as to fundamental principles of comity and abstention, and poses a substantial threat to the integrity of a vital state regulatory system.

A. THE COURT OF APPEALS MISAPPREHENDED THE TRUE PARAMETERS OF THE DOCTRINE OF ABSTENTION AND EMASCULATED THE DOCTRINE TO THE DETRIMENT OF THE BALANCE BETWEEN FEDERAL AND STATE JURISDICTION

Abstention is an important legal doctrine which should be given full breadth. It is a principal means by which states may be permitted to fulfill their role in the dual judicial system of the United States of America. Abstention is also a vital tool of the federal judiciary to be exercised in situations which, while finite in number, are critical to the maintenance of harmony between federal courts and state courts. The State of Colorado urges that this writ of certiorari be granted in order that the Supreme Court may clarify the appropriateness of the District Court's exercise of abstention in this case and thus revitalize the doctrine of abstention as a salient judicial mechanism for fostering healthy federal-state relations.

The Court of Appeals misapprehended the situations in which an exercise of the authority to abstain is correct. Two of the principles set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), which first expressly recognized the abstention doctrine, are present in the instant case. The Supreme Court held that a federal district court may abstain whenever such action will foster harmonious relations between a state and the central sovereign. Additionally, a court may defer or stay an action before it when a state process exists for the determination of the issues and no showing has been made that the state

forum is unable to adequately resolve the claim or controversy. Subsequent to the landmark decision in *Pullman, supra,* abstention has been delicately molded into an expedient doctrine integral to the federal judiciary's control over its jurisdictional sphere and to its responsibilities to advance federalism.

The independence of state governments and the traditional roles that state forums have undertaken are frequently noted as grounds upon which abstention may be exercised. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943); *Matthews v. Rodgers,* 284 U.S. 521 (1932). Similarly, a discerning comprehension of our federal system of government has been articulated as sufficient reason in and of itself for a federal court to abstain. *Alabama Public Service Commission v. Southern Railroad Co.,* 341 U.S. 341 (1951); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission,* 465 F.2d 237 (3rd Cir. 1972), cert. denied 410 U.S. 943 (1973). Where, although the state law may be settled, federal claims are closely associated with or related to state law and are entangled in the skein of a state regulatory system, federal courts often stay their hand in order to avoid unnecessary interference with the state regulatory process. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 311 U.S. 570 (1941); *Gay v. Board of Registration Commissioners,* 466 F.2d 879 (6th Cir. 1972).

The greater the level of importance which a state attaches to the subject matter of the litigation the more inclined a federal court should be to decline jurisdiction. The Supreme Court has previously ordered the deference of jurisdiction to state courts in a similar case involving water rights. In so holding the Court declared:

> The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural re-

sources. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 594 (1968).

The holding the Court of Appeals undermines the rationale of this Court in *Kaiser, supra.*

Abstention is particularly appropriate where the subject matter is not only vital to the state but is complex and the expertise of the state forum is well established. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Water law is a sophisticated and complex field of law. Colorado has developed over some one hundred years of statehood a statutory scheme and judicial process which has special and peculiar capabilities in the handling of the adjudication and administration of water rights. In contrast, if the recognized adequacy and efficiency of the state procedure is cast aside, the important claims of all parties will be relegated to the nonexistent administrative system of the federal judiciary.

The doctrine of abstention applies with even greater force when a parallel action is pending in the state court. *PPG Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1973). The United States has been joined in state court and all of its claims may be adjudicated in that forum. The decision of the Court of Appeals forces the Federal District Court to develop a duplicative, untried and wasteful procedure.

All of the bases discussed support the trial court's act of abstaining. Unquestionably the state-federal relationships will be enhanced by deference to the state court. Water, as in New Mexico, is a vital natural resource of utmost importance to Colorado. There is a parallel state action which is fully competent to determine all the claims advanced in federal court. Patently, the case represents one which will be lengthy and complicated and, if the re-

mand to the Federal District Court is sustained, there will be an obvious adverse impact upon the federal court docket. The federal reserved rights asserted are inextricably entwined in the total fabric of the state water right system. The claims of the United States are closely related to state law in that they must be adjudicated *inter se* with the water rights of some twelve hundred defendants whose claims were established pursuant to Colorado law. The intrusion of a federal court into water right administration will cause confusion, delay, possible misunderstanding of state law, hardship upon those who must defend their rights against the federal claims, and unnecessary interference with state policy and a well-functioning state regulatory system. The judgment of the trial court is consistent with treatment of similar cases by area federal courts. *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956); *Four Counties Water Users Association v. Colorado River Water Conservation District and the United Staets of America*, (unreported decision, Civ. No. 8880, District Court of Colorado, Chilson, J., 4/12/65).

The pigeonholing approach of categorization of the Court of Appeals' opinion in analyzing the doctrine of abstention results in unwarranted contraction of the doctrine. Abstention rests upon intrinsic tenets of federalism as well as a sound appreciation of the proper functions and relationship of the state and federal judicial systems. Such a significant doctrine of law, so vital to a healthy federalism, should not be restricted by division into stilted classes but rather should be given effect when the factors urging abstention decidedly outweigh those factors which favor the assumption of jurisdiction. The precedent of this appellate court's interpretation, should it be allowed to stand, will deter and hinder the use of abstention for the beneficial purposes which this court has previously encouraged. Concern for the continued availability of absten-

tion as a judicial means for controlling the equilibrium between federal courts and state courts entreats this court to grant the writ of certiorari.

B. COMITY IS A CORRECT BASIS FOR THE DISMISSAL OF THIS ACTION BECAUSE THE CONFLICT OF FEDERAL JURISDICTION WITH STATE COURTS IS UNNECESSARY.

Reasons of comity were a ground upon which the federal court dismissed this action. Though this was expressly recognized by the Court of Appeals, the issue of comity is nowhere else mentioned in the Court's opinion. Comity is a policy concept which reflects the federalistic nature of the United States of America. Sensitivity to the legitimate interests of both the individual states and the central sovereign, and recognition of the sovereign status of the individual state are the underlying principles of comity. *Younger v. Harris,* 401 U.S. 37, 44-45 (1971); *Dresser Industries, Inc. v. Insurance Co. of North America,* 358 F. Supp. 327, 329 (N.D. Tex. 1973). Comity is a well-established, independent, and salutary principle which in and of itself is sufficient ground upon which a district court may refuse jurisdiction and repair the controversy to state proceedings.

An action was pending pursuant to Colorado's Water Right Determination and Administration Act of 1969 to determine the relative rights of all parties to the San Juan River system (which is included in Water Division 7 under the state scheme) at the time the United States chose to ignore that appropriate forum and attempted to bifurcate the water right determination procedure by filing its action in the United States District Court. If the federal action proceeds, over 1200 defendants must bear the oppressive burden of appearing in the geographically remote federal

court to defend their water rights which were established pursuant to state law perhaps as long as a century ago.

It is difficult to imagine a more sweeping interference with a vital state function or a greater threat to the integrity of a comprehensive state regulatory system than is presented by the prayer of the complaint for an independent adjudication of federal rights and for appointment of a federal water master to distribute water on streams otherwise administered by state officers under state court decrees and pursuant to state law. Since water rights are interrelated and cannot be adjudicated independently of other rights, it has been necessary for the United States to join some 1200 defendants in this case and require them to readjudicate rights already vested in them in prior proceedings. Presumably, the court will be required to retain jurisdiction after issuing the final decree so that it can resolve protests, abandonment questions, and all the other myriad problems that occur in the administration of a large river system. To the extent such determinations may conflict with determinations of state water judges and water engineers, the federal court will undermine the state regulatory scheme while becoming enmeshed in difficult jurisdictional problems concerning the extent to which it may override state court determinations of state-created rights. And, to the extent the federal court detemines the rights of the United States to the use of waters in the San Juan River Basin, the state courts will be powerless to administer these rights in conjunction with those adjudicated under state law because the state courts would then be assuming jurisdiction of rights adjudicated by the federal court and thereby interfering with a federal decree.

The consistent national policy of adherence to state law and state procedure in the acquisition and administration of water rights by the federal government supports

dismissal based on comity. *See, In re Green River Drainage Area,* 147 F. Supp. 127 (D. Utah 1956). The significant factors of federalism far outweigh the factor opposing comity, namely, the United States' victory in the race to the court house. *Pennsylvania v. Williams,* 294 U.S. 176 (1935); and *Hutchins v. Pacific Mutual Life Ins. Co. of California,* 20 F. Supp. 150 (S.D. Cir. 1972).

The doctrine of comity is clearly applicable to this case. Water right determination has been the near exclusive province of the State of Colorado for over one hundred years. Water is a scarce resource in Colorado and preservation of a single scheme for the allocation of that resource is of great concern to Colorado as well as to other western states. The avoidance of injury to federal-state harmony and the maintenance of a unitary procedure in regard to water right determination are adequate bases to support the policy determination that comity should prevail.

C. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH RECENT DECISIONS OF THE UNITED STATES SUPREME COURT IN REGARD TO THE APPROPRIATE FORUM FOR WATER RIGHT DETERMINATION.

In 1971, the United States Supreme Court decided *United States v. District Court in and for the County of Eagle,* 401 U.S. 520 (1971) (hereinafter *Eagle County*), and its companion case *United States v. District Court in and for Water Division No. 5,* 401 U.S. 527 (1971) (hereinafter *Division 5*). Although the Court of Appeals opined that *Eagle County* was not persuasive of petitioners' position, a manifest inconsistency exists between the underlying principles of those cases and the opinion of the Court of Appeals.

The issues of abstention and comity were not specifically addressed in *Eagle County* and *Division 5*. However, in those cases the Supreme Court tersely rejected the United States' argument that state courts were incompetent and not authorized to adjudicate federal reserved rights.

> We reject that conclusion for we deal with an all-inclusive statute concerning "the adjudication of rights to the use of water of a river system" which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights. [*Eagle County* at 524.]

After consideration of 43 U.S.C. § 666 (the McCarran Amendment), its legislative history, and the nature and abilities of the Colorado water right determination and administration process, the United States Supreme Court pointedly declared the state system to be fully capable and legally empowered to adjudicate all federal claims for water rights.

The inconsistency between the decision of the Court of Appeals and *Eagle County* is that the former creates the very bifurcation of federal water claims which was curtly rejected in the latter. The United States has stated that it has brought this action in federal court because it does not wish to have claims brought on behalf of Indians adjudicated in state court. The attempt to circumvent *Eagle County* on this ground is unsupportable and offensive to the fairness and competency of the Colorado system. *Eagle County* declared state courts to be capable to hear *all* federal water claims.

It must be recognized that water rights are interdependent; the adjudication and administration of a water right relates to all the rights in a common source of sup-

ply. The crucial concern in a water right adjudication is the relative priorities of the diverters. In Colorado, this interdependency has led to the adjudication and administration of water rights on a continuing basis in special water courts which also determine changes in use, alteration and transfer of diversion points, waste and nonbeneficial uses and abandonment.

The McCarran Amendment, 43 U.S.C. § 666, implicitly recognizes the relative and dependent nature of water rights. It not only permits the joinder of the United States for the adjudication of water rights but for their administration. The bill was a practical solution to a potentially chaotic situation. The intent of the McCarran Amendment to determine and administer water rights in a common water source in a single forum should not be cast aside without compelling reason.

The McCarran Amendment as originally introduced was objected to because of its provision for removal by the United States to federal court of any such action in which the United States was joined. A Department of Justice spokesman realized the undesirability of a dual water right system and the unnecessary burdens that federal court jurisdiction would place on those with water rights under the state system. Hearings on S. 18 before a subcommittee of the Senate Committee on the Judiciary, 82d Con., 1st Sess. at 5, 7 (1951). The provision permitting removal was eliminated.

The legislative history of the McCarran Amendment was presented to and reviewed by this Court in *Eagle County* and clearly supports the position that federal water rights be adjudicated in one state proceeding that can accord complete relief to all concerned parties. The questions not decided by the Court in *Eagle County* were the existence and scope of the reserved rights claimed by the United States, as well as the proper resolution of any

conflicts between such reserved rights and previously decreed rights. "All such questions," the Court stated, "including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court." [*Eagle County* at 526.]

The question presented here is whether the Colorado court will ever have the chance to reach those questions. The decision of the Court of Appeals permits circumvention of fundamental state and congressional policy by permitting the United States to bifurcate water proceedings by the simple expedient of presenting all federal water claims to federal courts. Once this has been effected on a broad scale, no method will exist for integration of water decrees, coordinated judicial control over water matters, nor unified administration. Thus, the very evil that Congress sought to prevent by enactment of the McCarran Amendment is resurrected if the decision below is permitted to stand.

Finally, it is important to note that, if the District Court is required not to abstain in this case, it will be placed in the position of water judge for a vast river system in southwestern Colorado, involving adjudication and administration of water rights claimed by thousands of users. The involvement of the federal court will not be ended by its determination of the scope of the reserved rights claimed by the United States; the Complaint seeks *continuing* relief in the form of administration of those rights with all the state-created rights.

Eagle County and *Division 5* support the retention of a unitary water right determination system. The issues of abstention and comity and the appropriateness of the state forum presented in this case are merely the natural continuation of the questions which were before this Court in

Eagle County. The underlying rationale and the overt holdings of those cases support the Federal District Court's dismissal of this action.

In contrast, the reversal of the District Court's decision by the Court of Appeals seriously undermines *Eagle County*. Unless the District Court's dismissal is upheld, the intent of the McCarran Amendment, its usefulness to the water right determination process of the states, and the efficiency it promotes, will all be frustrated. The functional integrity and historic exclusiveness of Colorado's water right determination system, so wisely protected and advanced by *Eagle County* and *Division 5* are abrogated by the judgment of the Court of Appeals. The need to resolve the inconsistency of the Court of Appeals' decision with the holdings of *Eagle County* and *Division 5* urges that a writ of certiorari be granted in this case.

VIII. CONCLUSION

It is respectfully submitted that the application of the doctrines of abstention and comity by the Federal District Court was correct. The act of staying its hand was a logical and proper succession to this Court's holding in *Eagle County* and was consistent with the intent of Congress as expressed in the McCarran Amendment. By repairing the parties to the state court proceeding, federal-state harmony is preserved, the national policy that state processes may determine all water rights is continued, unnecessary interference with Colorado's regulatory scheme is avoided, and the federal courts and 1200 defendants are relieved from the unjustified burden of this litigation. The need for review by this court is manifested by the significance of the legal doctrines involved to our dual judicial system and the paramount concern of the State of Colorado that the determination of water rights remain a unitary and effi-

cient process. It is respectfully requested that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals.

Respectfully submitted,

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On behalf of all Defendants and Intervenors

By
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APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

MARY AKIN ET AL.,

Defendants-Appellees.

No. 73-1807

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Submitted Aug. 19, 1974.

Decided Oct. 2, 1974.

Rehearing Denied Nov. 12, 1974.

Walter Kiechel, Jr., Deputy Asst. Atty. Gen. (Wallace H. Johnson, Assist. Atty. Gen., and Edmund B. Clark, Donald W. Redd, and Lawrence E. Shearer, Attys., Dept. of Justice, Washington, D.C., on the brief), for plaintiff-appellant.

John E. Bush, Deputy Atty. Gen. (John P. Moore, Atty. Gen., Clyde O. Martz, Raphael J. Moses, and James D. Geissinger, Special Asst. Attys. Gen., on the brief), for defendants-appellees The State Board of Agriculture and The Colorado Game and Fish Commission (Colorado Wildlife Commission and Colorado Board of Parks and Outdoor Recreation).

L. W. McDaniel, Durango, Colo., on the brief for defendant-appellee Southwestern Water Conservancy Disttrict.

Fairfield & Woods and Ireland, Stapleton, Pryor & Holmes, P. C., Denver, Colo., on the brief, for defendant-

appellee Mancos Water Conservancy District.

Fairfield & Woods, Denver, Colo., on the brief for defendant-appellee Southeastern Colorado Water Conservancy District.

Kenneth Balcomb, Glenwood Springs, Colo., for intervenor-appellee Colorado River Water Conservation District.

Thomas W. Fredericks, David H. Getches and Robert S. Pelcyger, Attys., Native American Rights Fund, Boulder, Colo., on the brief of amici curiae Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe and National Tribal Chairmen's Association.

George L. Zoellner, Kenneth L. Broadhurst, Glenn Saunders, Special Counsel and Jack Ross, Special Counsel, Denver, Colo., on the brief, for defendant-appellee City and County of Denver, acting by and through its Board of Water Commissioners.

Before HILL and DOYLE, Circuit Judges, and TALBOT SMITH*, District Judge.

WILLIAM E. DOYLE, Circuit Judge.

The questions presented in this appeal are, first, whether or not the District Court had jurisdiction to entertain this action which was instituted by the United States on its own behalf and on behalf of certain Indian tribes, or, secondly, assuming that the District Court had jurisdiction, whether the court should have abstained.

This is a water rights case which was instituted by the United States in the United States District Court for the District of Colorado. The action was brought on behalf of the United States and on behalf of the Ute Mountain and

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*Honorable Talbot Smith, United States District Judge, Ann Arbor, Michigan, sitting by designation.

Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.** In this action the plaintiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran

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**It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

The United States District Court's dismissal of the action was on the ground of the abstention doctrine and for reasons of "comity." In effect, therefore, the court's assumption was that it had jurisdiction.

Thus, the primary issue is whether the trial court erred in its decision to abstain. Inasmuch as the defendants-appellees also contend that the District Court lacked jurisdiction to hear the case, we shall take up that issue also.

I.
THE JURISDICTION QUESTION

The United States has alleged that jurisdiction in District Court was conferred by 28 U.S.C. § 1345 which gives to district courts original jurisdiction of all civil actions commenced by the United States except as otherwise provided.

The Colorado River Water Conservation District takes the position that 43 U.S.C. § 666, the McCarran Amendment, which gives consent to joinder of the United States "in any suit for the adjudication of rights to the use of water," etc.,[1] not only gives a state court jurisdiction over

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[1] The full text of this section reads as follows:
Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

the United States, it also, according to their further argument, excludes federal courts from assuming jurisdiction. We disagree.

The starting point in this analysis is Article III of the United States Constitution which extends the judicial power to controversies to which the United States shall be a party. Although this provision is not self-implementing, it does evidence the intention of the Framers to allow the United States to sue in its own courts. The statute, § 1345, *supra,* confirms this right of the United States.[2]

The rationale for the right of the United States to sue in federal court is expressed by Mr. Justice Story in his work, Story, The Constitution § 1674:

> It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the states.

The right was recognized from the earliest days in our history. The Judiciary Act of 1789 gave the district courts jurisdiction concurrent with that of the state courts "of all suits of a civil nature at common law or in equity," subject to a jurisdictional amount. The clear right of the United States to maintain actions asserting proprietary rights is discussed in H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at

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[2] Section 1345, supra, provides:
§ 1345. United States as plaintiff
Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil action, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

1301-09. The authors cite Cotton v. United States, 11 How. 229, 13 L.Ed. 675 (1850) as an example of the right of the United States to bring an action even without an authorizing statute. That was a trespass case.

With respect to the cases in which the government asserts a proprietary right, the authors say:

> The most striking recent examples of the assertion of proprietary rights of the United States, illustrating the magnitude of the interests that may be involved, were the much-disputed tidelands cases. Compare the motion of the United States for leave to intervene in Nebraska v. Wyoming, 304 U.S. 545 [58 S.Ct. 1035, 82 L.Ed. 1519] (1938). See Comment, Federal Fallbrook Case, 31 Tex.L.Rev. 404 (1953). See also the cases growing out of the oil scandals of the Harding administration. Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 [47 S.Ct. 416, 71 L.Ed. 734] (1927); Mammoth Oil Co. v. United States, 275 U.S. 13 [48 S.Ct. 1, 72 L.Ed. 137] (1927).
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> Closely related to the proprietary cases are those in which the United States has established its status as guardian of the Indian tribes and its standing in litigation to vindicate Indian rights. See *e.g.*, Heckman v. United States, 224 U.S. 413 [32 S.Ct. 424, 56 L.Ed. 820] (1912); United States v. Board of Comm'rs of Osage County, 251 U.S. 128 [40 S.Ct. 100, 64 L.Ed. 184] (1919); Cummings & McFarland, Federal Justice 250-317, 384-413 (1937).

H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1302.

[1] The McCarran Amendment does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water. It is said

by appellees that the original language of the Amendment contained a proviso which allowed the United States to remove to federal court any action in which it was a defendant within the scope of the waiver of sovereign immunity contained in the Amendment. The argument continues that since Congress dropped this proviso it follows that Congress intended to deprive the United States of its right to sue under § 1345. We disagree with the conclusion drawn. The McCarran Amendment merely allowed the United States to be *joined* in a state action in a case in which the United States owns water rights and is a necessary party to the suit. However, this falls short of furnishing by implication a repeal of § 1345 applicable to water cases. The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States. So, elimination of the removal proviso originally in the Amendment at most expressed congressional intent that where the United States is joined under the circumstances set forth in the Amendment it will not be allowed to frustrate the procedures in the state court. But the statute did not prohibit the United States from ever removing a water rights case to the federal court. If Congress had intended to force the United States to litigate its water cases in state courts, it could have done so by creating a water rights exception to § 1345. This it did not do either expressly or impliedly.[3]

The decisions in United States v. District Court,

[3] Senator McCarran himself stated that:

S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, 82d Cong., 1st Sess., at 9. See also United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971); Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Nevada ex rel. Shamberger v. United States, 279 F.2d 699 (9th Cir. 1960).

County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971) and United States v. District Court, Water Division No. 5, Colo., 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed. 2d 284 (1971) do not support the appellees in their present contentions. The issue in both of these was whether the consent to suit of the United States by provision of the McCarran Amendment extended to reserved rights. The Supreme Court held that the Amendment did include this type of right and it followed that the United States could be joined as a *defendant* in a state water rights proceeding. But by so holding the Court did not impliedly say that the United States was prohibited from litigating its reserved water rights as a plaintiff in federal court. At most, it held that the McCarran Amendment authorized a concurrent jurisdiction with state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under § 1345, *supra*. This is far different from appellees' position that the Amendment prohibits the United States' litigation of these rights in federal court.

Nor does the decision of the United States District Court for the District of Utah in In re Green River Drainage Area, 147 F.Supp. 127 (D.Utah 1956) support appellees. This was a removal problem wherein the court held that the United States cannot automatically remove its water rights cases to federal court. The court conceded that the McCarran Amendment does not preclude such removal if it would otherwise be removable.

The Supreme Court in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963) considered a situation in which the United States was joined as a defendant in a private suit to determine water rights solely between certain private claimants and the United States. The Court held that the McCarran Amendment was not intended to apply to a private suit between the United States and a private party to determine conflicting water rights contentions.

We must then reject the notion that the McCarran Amendment partially repealed or modified § 1345, *supra*. This conclusion suggests that § 666 has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subjected to state jurisdiction.

II.
THE ABSTENTION QUESTION

Having concluded that the United States District Court's jurisdiction was unimpaired, the issue remains whether, considering the character of the case, the District Court was correct in its abstention stance. The Conservation Districts together with the Board of Water Commissioners, State Board of Agriculture and the Colorado Game and Fish Commission assert, of course, that abstention was proper. The United States complains that the court's action was erroneous.

It has been recognized from very early times that federal courts are not to decline the exercise of expressly granted jurisdiction. This principle was first expressed by Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). This oft-repeated statement was that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." On its face this concept conflicts with the abstention principle which is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

A. *Guidelines*

[2] It is, of course, fundamental that the doctrine of abstention is to be applied in narrowly limited special circumstances. *See* Zwicker v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967) (citing Propper v. Clerk, 337 U.S. 472, 492, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). *See also* Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed. 2d 1163 (1959); Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

B. *Applicable Areas*

1. The Supreme Court placed it in perspective when it said that it is an extraordinarily narrow exception to the rule that a federal court has a duty to adjudicate a controversy presented to it over which it has jurisdiction. *See* County of Allegheny v. Frank Mashuda Co., *supra,* and *see* Meredith v. City of Winter Haven, *supra.* It is within this narrow scope that we examine the various cases which have applied the abstention principle.

One facet of the abstention doctrine is that which seeks to give a state court full opportunity to dispose of a case which is potentially governed by state law before entertaining it and deciding it as a constitutional law question. *See* Railroad Commission of Texas v. Pullman Company, *supra,* a case in which the parties being regulated sought an injunction against enforcement of an order of the state regulatory agency.

Ours is not a case which presents constitutional questions and state questions, both of which show capability for disposing of the case whereby the state decision could obviate the necessity for a constitutional law decision.

2. A second abstention category is exemplified in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87

L.Ed. 1424 (1943), which holds that federal courts are not to interfere with state regulatory schemes; that they are to refrain from anticipating a constitutional question and interfering with the state regulatory agency when it is engaged in administering state law. *See* Alabama Public Service Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951); Hawks v. Hamill, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933); 1A J. Moore, Moore's Federal Practice § 0.203 [1]; C. Wright, Law of Federal Courts 200 (2d ed. 1970).

Here the federal court is not short-circuiting or interfering with efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

3. A further recent application of abstention is in cases in which a novel and important issue of state law is presented. *See* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 88 S.Ct 1753, 20 L.Ed.2d 835 (1968). *Kaiser* was a New Mexico eminent domain and water case. It concerned alleged inconsistency between a New Mexico statute and the New Mexico Constitution. Based on the fact that this was a novel and highly important question for the State of New Mexico, it was ruled that abstention was there appropriate. This holding was not dissimilar from Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). *Compare* County of Allegheny v. Frank Mashuda Co., *supra*. The fact, however, that both *Kaiser* and our case involve water rights does not render *Kaiser* determinative.

C. *The Race to the Courthouse.*

[3] The Colorado litigants also argue strenuously that this case must not be determined by who wins the race to the courthouse. This is a recurring contention in

cases in which state and federal courts have concurrent jurisdiction over a property case. True, the race idea has no intrinsic attractiveness. At the same time, it must be recognized that priority of filing has validity in the situation in which concurrent jurisdiction exists. The priority of the court which first acquires jurisdiction over the subject matter is entitled to recognition, and where the plaintiff has selected the forum and has filed first, his right to try his case in that court is not to be lightly dismissed.

The priority principle is held to apply where a federal and state court have concurrent jurisdiction and the action is *in rem*. *See* Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935); Kline v. Burke Constr. Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922); Palmer v. Texas, 212 U.S. 118, 29 S.Ct. 230, 53 L.Ed. 435 (1909); Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); Gay v. Brierfield Coal & I. Co., 94 Ala. 303, 11 So. 353 (1891); Crosby v. Spear, 98 Me. 542, 57 A. 881 (1904); Rogers & B. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S.W. 57 (1896); 20 Am.Jur.2d, Vol. 20 § 135, p. 485. And so the priority factor is entitled to be weighed in the abstention scale.

D. *Effect on Abstention of United States as Plaintiff*

We next consider (on the decision to abstain) the effect of the presence of the United States as a party plaintiff in the action. There is a dearth of authoritative case law bearing directly on the point. The most helpful decision is that of the Supreme Court in Leiter Minerals v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). The essential issue in that case was whether the United States owned minerals on lands, the surface of which it owned. A private party had claimed the minerals

in a state court action against the lessee of the United States. Thereupon, the United States filed an action in the United States District Court for the Eastern District of Louisiana. It sought to quiet title and to enjoin the adverse claimant in state court from prosecuting its action. The section of the Judicial Code which prohibits injunctions against State Court actions, 22 U.S.C. § 2283, was interposed. But the Supreme Court held that it was inapplicable to the United States when it was the suitor. In reaching this result the statute was ruled to be ambiguous and not susceptible to imputing congressional intent to make it applicable to the United States.[4] The Court went on to hold that it was proper for the District Court to entertain the suit in the federal court ". . . and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment." The Court's prior decision in United States v. Bank of New York & Trust Co., 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936) in which an injunction had been denied, notwithstanding the presence of the United States as a party, was distinguished on its facts. There, it was pointed out, the United States was one of many claimants to a fund and was not different from any other litigant. However, in treating the United States differently in *Leiter* it was emphasized that the policy (of exempting the United States

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[4] The reasoning of the Court was:

There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, alone. 352 U.S. at 225-226, 77 S.Ct. at 290-291.

from the anti-injunction statute) is more compelling where the United States seeks to advance a national interest.[5]

[4] The presence of the United States as a plaintiff seeking to establish rights which have a national and sovereign character is then a factor which militates strongly against the applicability of abstention.

[5] Finally, the counsel for the appellees urge that the Supreme Court's decision in United States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) justifies the trial court's decision to abstain. We have carefully considered this case and we are of the view that it does not consider the problem which is presented in the case at bar. The United States there sought through writ of prohibition in the Colorado Supreme Court to prevent the District Court for Eagle County, Colorado from asserting jurisdiction over it. This effort failed, but this case did not suggest a lack of jurisdiction of the federal district court in a federal district court in a suit instituted by the United States. Nor did it hold that the state court by virtue of § 666 had exclusive jurisdiction. Further, it did not hold nor even suggest that

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[5] The opinion distinguishes the situation where the United States is "like any private claimant":

Moreover, the Bank of New York case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed and that were in the hands of depositaries appointed by the state court. In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state litigation has the elements of an action characterized as quasi in rem. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in the federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment.

352 U.S. at 227-228, 77 S.Ct. at 292.

abstention by a federal court, the jurisdiction of which had been invoked, should be ordered.[6]

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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[6] The Court was careful to note that reserved water rights of the United States "are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court." 401 U.S. at 526, 91 S.Ct. at 1003.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-4497

UNITED STATES OF AMERICA, *Plaintiff,* vs. AKIN, MARY, et al., *Defendants.*	Reporter's Transcript of Court's Ruling

Proceedings before the HONORABLE SHERMAN C. FINESILVER, Judge, United States District Court for the District of Colorado, beginning at 2:00 p.m. on the 21st day of June, 1973, in Courtroom D, United States Courthouse, Denver, Colorado.

APPEARANCES

DONALD W. REDD, Esq., Department of Justice, Washington, D.C. and KENNETH J. BURKE, Esq., United States Department of Justice, Denver, Colorado.

JOHN BUSH, Deputy Attorney General, State Capitol Building, Denver, Colorado.

GLEN G. SAUNDERS, Esq., Capitol Life Center, Denver, Colorado.

KENNETH BALCOMB, Esq., Post Office Drawer 790, Glenwood Springs, Colorado, C.R.W.C.D.

JAMES GEISSINGER, Special Assistant to the Attorney General, State Capitol Building, Denver, Colorado.

RAPHAEL MOSES, Special Assistant Attorney General, State Capitol Building, Denver, Colorado.

CHARLES J. BEISE, Esq., 1536 First National Bank Building, Denver, Colorado.

D. MONTE PASCOE, Esq., 1700 Broadway, Suite 2017, Denver, Colorado.

HOWARD K. HOLME, Esq., First National Bank Building, Denver, Colorado.

PROCEEDINGS:

THE COURT: The record should reflect that we are proceeding in Civil Action 4497, United States of America vs. Mary Akin, et al. Starting with plaintiff's counsel, the Court would ask you to stand, and give us your name and who you represent, please.

MR. REDD: Donald W. Redd, from the Department of Justice representing the United States, Your Honor.

MR. BURKE: Kenneth J. Burke, United States Department of Justice, Denver, Colorado, representing the United States.

MR. BUSH: John Bush, Deputy Attorney General on behalf of the State Board of Agriculture and Colorado Game and Fish Department.

MR. SAUNDERS: Glenn G. Saunders, City and County of Denver, Board of Water Commissioners.

MR. BALCOMB: Kenneth Balcomb, Colorado River Water Conservation District and James D. Geissinger, Special Assistant to the Attorney General in connection with the Game and Fish and Department of Agriculture.

THE COURT: Mr. Moses?

MR. MOSES: Raphael Moses, Special Assistant to the Attorney General for the Game and Fish.

THE COURT: Who are some of the representatives for the Water Conservancy Districts.

MR. BEISE: Charles J. Beise, Southeastern Colorado Water Conservancy District and co-counsel for the Mancos Water Conservancy District.

MR. PASCOE: Monte Pascoe with John Rogers also co-counsel for the Mancos Water Conservancy District.

MR. HOLME: Howard K. Holme, Southwest Colorado Water Conservancy District and co-counsel for the Mancos Water Conservancy District.

THE COURT: Any other gentlemen who have—

MR. HARRISON: David Harrison with Mr. Moses who is representing the State of Colorado and the Special Attorney General.

THE COURT: The Court is considering this matter as a Motion to Dismiss. The Court has been favored with very extensive briefs on the legal issues and the respective contentions. As this Court sees the posture of this case, this is a civil action filed by the United States in order to have its rights and the rights of the Ute Mountain Ute and the Southern Ute Indian tribe in and to the waters of the Mancos, the La Plata, Animas, Florida, Los Pinos, Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado determined and declared. The jurisdiction of this Court is invoked under 1345 of Title 28 of the United States Code. The action lists between a thousand and fifteen hundred defendants in the case depending on what time of day you make the counting and to what degree you figure some of the names. The defendants also include other unknown claimants of interest to the water in these rivers and tributaries.

The Court's inclination is to apportion half an hour

a side. Mr. Bush, do you feel this is sufficient for the defendants to apportion to them?

MR. BUSH: If the Court could afford us a little more time, maybe forty minutes. There are only two that are going to argue.

THE COURT: Well, the Court will extend that to forty minutes a side, please, as the case might be.

Is this agreeable to you?

MR. REDD: The thirty minutes will be ample for us, Your Honor.

THE COURT: The Court will extend to the defendants forty minutes. The Court will entitle the plaintiffs the same period of time.

Mr. Bush, would you proceed, please.
(Argument by counsel.)

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THE COURT: This matter comes before the Court on the Motions to Dismiss or Reconsider in regard to—as filed by the defendants or intervenors in this case. Particularly, the defendants contest the jurisdiction of this Court to entertain the instant action and in any event, the defendants submit in general that the federal government should be compelled to proceed with this action in Division 7 of the state court or in the state courts.

The jurisdiction of this Court is purportedly invoked under Section 1345 of Title 28 United States Code. The plaintiff views this action as a suit in which the United States seeks to have its rights and concomitant priorities and the rights of the Ute Mountain Ute and the Southern Ute Indian tribes in and to the use of certain waters in the State of Colorado determined and declared.

The water in question is situated in the State of Colorado as described. At this time there are approximately 1,200 named defendants in this suit.

The Court views the following as the applicable law and statutes. First, the McCarran Amendment passed in 1952 designated as 43 United States Code Section 666 which provides for the joinder of the United States in a state court suit for the adjudication of water rights. Further the Water Rights Determination and Administration Act of 1969, Colorado Revised Statute 1963, Section 148-21-1 and other sections which provides a system for the adjudication of the waters of the natural streams in the State of Colorado. Also of considerable import is the case of *United States vs. Eagle County*, 458 P.2d 760, 169 Colo. 555 which was affirmed by the United States Court, 401 United States 510, 91 S.Ct. 998, 28 L.Ed. 2d 278. Also the companion case, *United States vs. District Court in and for Division No. 5*, 401 U.S. 527.

A pivotal issue involved herein and one which is worthy of comment is the McCarran Amendment and its underlying intent coupled with the decision of the Supreme Court in the Eagle County case determined that the adjudication of such matters, that is rights of the United States to the use of state waters, is solely a matter of state jurisdiction to the exclusion of the federal courts. This issue of jurisdictional exclusivity was not decided in the Eagle County case in the opinion of this Court or its companion case. Rather as we view these two authorities, the state court had jurisdiction under the McCarran Amendment and that 43 United States Code Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within the particular state's jurisdiction regardless of how the rights were required.

However, the nature and posture of this suit in the view of the Court does not necessitate that this Court make a determination as to the exclusiveness of jurisdiction of this matter. Rather the Court finds that the State of Colorado has a well defined, workable system for adjudication of water rights of all claimants; that the United States is not immune from suit in the state courts and the United States, as it is presently doing in other water rights suits in the state courts of Colorado, apparently the United States has filed claims in Divisions 4, 5 and 6, should initiate action in the appropriate state court.

Further the Court also notes that the United States has either been served or is in the process of being served in Water Division 7, the district in which adjudication of the instant rights are located.

Although the intention of the McCarran Amendment and the Supreme Court decisions on the matter of exclusive jurisdiction are not manifestly clear, they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The Court perceives a practical approach in this case. Aside from the strict legal interpretations, the Court envisions that a practical approach must recognize that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are practical impediments to requiring everyone in this particular area to litigate the matter in the federal courts.

Further the Court is satisfied from a practical approach that this would be perhaps an unreasonable burden

placed upon the citizens of Colorado and in attempting to locate individual water rights that the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The Court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.

The question that has also been presented is that perhaps the federal courts are best equipped to interpret and adjudicate federal law. However, we are satisfied that the federal courts are not the only forums under the obligation to enforce federal law. In our opinion, we should entertain jurisdiction only after the state court with its well defined expertise and considerable embodiment of law over the years, have had the opportunity to address itself to the issues inherent in this litigation. We have the question of comity between the courts. This is intertwined with the question of abstention. As we view it, comity is based on the discussion that the state can adequately vindicate federal rights and when this assumption proves incorrect, the federal courts may then act in a proper case and under applicable constitutional and federal law.

The Court for a totality of the reasons expressed under the doctrine of abstention or by comity in recognition of the presence of applicable and workable state law, we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the Indian tribes or any other individual litigants. To this end the Court is granting the defendants' Motion to Dismiss.

The Court reserves unto itself discretion and jurisdic-

tion to enlarge this opinion in this bench ruling as necessary within the period of 30 days and no appeal period will commence running until the end of that period. So it will not be necessary for the plaintiff, United States, in this case to file any Notice of Appeal. The Court will reserve unto itself a 30 day period in which to enlarge or modify this opinion. This does not mean that the Court, in fact, will do so. However, the Court will not consider this as a final judgment during this 30 day period.

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(Court in recess.)

REPORTER'S CERTIFICATE

I, E. J. CARPENTER, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colorado, this 17th day of July, 1973.

My Commission expires December 4, 1973.

E. J. Carpenter
Official Reporter

APPENDIX C

PART 2

WATER DIVISIONS, COURTS

37-92-201. Water divisions. (1) For the purposes of this article, the following water divisions are hereby established:

(a) Division 1: Division 1 consists of all lands in the state of Colorado in the drainage basins of the South Platte river, the Big Laramie river, the Arikaree river, the north and south forks of the Republican river, the Smokey Hill river, Sandy and Frenchman creeks, and streams tributary to said rivers and creeks.

(b) Division 2: Division 2 consists of all lands in the state of Colorado in the drainage basins of the Arkansas river and the Dry Cimarron river, and streams tributary to said rivers.

(c) Division 3: Division 3 consists of all lands in the state of Colorado in the drainage basin of the San Luis creek, Saguache creek, Tuttle creek, Carnero creek, La Garita creek, Sand or Medano creek, Big Spring creek, Little Spring creek, Mosca creek, Sierra Blanca creek, and all of their tributaries, and all lands in the drainage basins of all other creeks between Trinchera creek and Sand or Medano creek, and lands in the drainage basins of all other creeks which have their sources of water supply in the La Garita mountains and flow eastward into the San Luis valley.

(d) Division 4: Division 4 consists of all lands in the state of Colorado in the drainage basins of the Gunnison river and all of its tributaries, the Little Dolores river, the San Miguel river, and that portion of the Dolores

river and its tributaries north of the north township line of Township 45 North, New Mexico Principal Meridian.

(e) Division 5: Division 5 consists of all lands in the state of Colorado in the drainage basins of the Colorado river and all of its tributaries arising within Colorado, with the exception of the Gunnison river; but for the purposes of section 37-92-203 and 37-92-204, the White river drainage basin shall be deemed a part of division 5.

(f) Division 6: Except as limited by paragraph (e) of this subsection (1), division 6 consists of all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river, the North Platte river, and all of their tributaries.

(g) Division 7: Division 7 consists of all lands located in the southwest corner of the state of Colorado and in the drainage basins of the San Juan river, Rio Piedra, Rio Las Animas, Los Pinos river, La Plata river, Rio Mancos and streams tributary to said rivers and creeks as well as that portion of the Dolores river and its tributaries lying south of the north line of Township 45 North, New Mexico Principal Meridian.

Source: L. 69, p. 1202, § 1; C.R.S. 1963, § 148-21-8.

37-92-203. Water judges - jurisdiction. (1) There is established in each water division the position of water judge of the district courts of all counties situated entirely or partly within the division. Said district courts collectively acting through the water judge have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division. Water matters shall include only those matters which this article and any other law shall specify to be heard by the water judge of the district courts.

(2) On or before January 10 of each year, the supreme court shall designate or redesignate a water judge for each division to hear all pending and new water matters in that division for the year in which the designation is made, and any vacancy that occurs during such year shall be filled by designation of the supreme court. The services of the water judge shall be in addition to his regular duties as a district judge but shall take priority over such regular duties, and the schedules of the judges in the various divisions shall be arranged and adjusted so that the water judge shall be free to hear water matters. If it becomes necessary during any year for the proper handling of water matters in any division, the supreme court shall designate one or more additional water judges of the district courts in that division, and the term "water judge", as used in this article, refers to all water judges acting in a division. The water judge for a particular division shall be selected from among the judges of the district courts of the counties situated entirely or partly within the division; except that the chief justice may make temporary assignments of other judges.

(3) The water judge of a division shall normally sit in the county where the water clerk is located, but at the discretion of the judge for convenience of parties he may sit in other counties in the state, and he shall conduct hearings in other counties as specified in section 37-92-304 (4). Should the functions of the water judge require separate or additional facilities, the same shall be provided for by the state from funds appropriated to the supreme court.

(4) For the purpose of making investigations required by section 37-92-302(4) and rulings required by section 37-92-303, the water judge of each division shall appoint such referees as may be necessary for that divi-

sion. The term "referee," as used in this article, refers to all referees acting in a particular division.

(5) Each water referee authorized by this section shall be appointed by the water judge of the water division from a list of not less than three qualified persons to be submitted to the water judge by the executive director of the department of natural resources; but in any water division the water judge may elect to perform the functions which by this article would otherwise be vested in the water referee. When and if an extraordinary work load exists in any water division, additional referees may be appointed.

(6) Persons appointed as water referees shall possess such training and experience as to qualify them to render expert opinions and decisions on the complex matters of water rights and administration. The persons may, as the situation requires, be either full-time, part-time, or contractual court employees of the state of Colorado. All expenses in connection with the performance of the functions of water referees, including salaries and other compensation, office space, and clerical and technical assistance shall be paid from funds appropriated to the supreme court. Each water referee shall execute such oath of office as may be prescribed by the supreme court.

(1) The water judge of each division by order shall refer promptly to a referee of that division all applications filed pursuant to section 37-92-302, and the water clerk of that division shall transmit promptly to such referee the order of referral and the duplicate application and thereafter shall transmit promptly to such referee duplicates of any statements of opposition that are filed.

Source: L. 69, p. 1204, § 1; C.R.S. 1963, § 148-21-10; L. 70, p. 430, § 1.

37-92-204. Water clerks—duties. (1)(a) There is es-

tablished in each water division the office of water clerk who shall be an associate clerk of the district court and shall be appointed in the same manner as clerks of the various district courts. The water clerk may be a part-time employee, or an existing clerk of the district court may be assigned additional duties as water clerk. Any reference in this article to a filing with the water clerk means a filing in the district court where such clerk serves.

(b) The water clerk shall maintain his office in the offices of the clerk of the district court of the county in each division as follows:

Division 1	Weld
Division 2	Pueblo
Division 3	Alamosa
Division 4	Montrose
Division 5	Garfield
Division 6	Routt
Division 7	La Plata

(2) The water clerk shall maintain the records of all proceedings related to appropriations, determinations of water rights and conditional water rights and the amount and priority thereof, changes of water rights, plans for augmentation, abandonment of water rights and conditional water rights, and the records of all proceedings of the water judge and of all rulings and actions of the referee required by this article to be filed with the water clerk. The clerks of the various district courts in each division, if requested by the water clerk of that division, shall transfer to the water clerk duplicate copies of any of the files, or parts thereof, of cases relating to water rights. The water clerk shall perform such other duties as may be prescribed by the water judge or the supreme court.

(3) Subject to the approval of the water judge, the

water clerk in each division shall employ such assistants and deputies as may be necessary for him to carry out his duties. The water clerk, assistants, and deputies shall execute such oath of office and such bond as may be prescribed by the supreme court.

(4) The expense of the office and staff of the water clerk shall be provided for out of state funds appropriated to the supreme court, and each county in which a water clerk's office is located shall be reimbursed for the cost thereof to the county.

Source: L. 69, p. 1205, § 1; C.R.S. 1963, § 148-21-11; L. 70, p. 431, § 2.

PART 3

DETERMINATION AND ADMINISTRATION OF WATER RIGHTS

37-92-301. Administration and distribution of waters. (1) The state engineer shall be responsible for the administration and distribution of the waters of the state, and in each division such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

(2) In accordance with procedures specified in this article, the referee in each division shall in the first instance have the authority and duty to rule upon determinations of water rights and conditional water rights and the amount and priority thereof, determinations with respect to changes of water rights, plans for augmentation, approvals of reasonable diligence in the development of appropriations under conditional water rights, and determinations of abandonment of water rights or conditional water rights; and he may include in any ruling for a determination of water right or conditional water

right any use or combination of uses, any diversion or combination of points or methods of diversion, and any place or alternate places of storage and may approve any change of water right as defined in this article.

(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on June 7, 1969, and by the priorities for water rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of waters of the state. Subject to section 37-92-502 (2), in determining and administering the use of water, judicial and administrative officers shall be governed by the following:

(a) In every case in which the owner of an appropriative right to divert water supplies his water needs by the use of a well, the water diverted by that well may be charged to its own appropriation; or it may be used to divert water under the provisions set forth in paragraph (b) of this subsection (3). This statutory statement is intended as a legislative acknowledgment of the long-held practice in Colorado under which various water rights may be carried through the same physical structure.

(b) In any case in which the owner of an appropriative right to divert water at the surface of a stream or to have water so diverted for his use or benefit has a well so situated as to draw water from the same stream system, that owner may secure the right to have such well, or more than one if he has more than one such well, made an alternate point of diversion to said surface right by procedures provided in this article for securing alternate points of diversion.

(c) Until July 1, 1972, all diversions by well to supply a water use for which there is a surface decree may be charged against and be considered as part of the exercise of said surface decree even if the owner has not secured the right to an alternate point of diversion at the well, but nothing in this article shall be construed to prevent regulation of the well in accordance with law and within the system of priorities established for regulation of diversions of water in Colorado.

(d) In authorizing alternate points of diversion for wells, the widest possible discretion to permit the use of wells shall prevail. In administering the waters of a watercourse, the withdrawal of water which will lower the water table shall be permitted but not to such a degree as will prevent the water source to be recharged or replenished under all predicable circumstances to the extent necessary to prevent injury to senior appropriators in the order of their priorities, and with due regard for daily, seasonal, and longer demands on the water supply.

(4) In every fourth calendar year after the calendar year in which a determination is made with respect to a conditional water right, the owner or user thereof, if he desires to maintain the same, shall obtain a finding by the referee of reasonable diligence in the development of the proposed appropriation, or said conditional water right shall be considered abandoned. The ruling of the referee and the judgment and decree of the court determining a conditional water right shall specify the month in such calendar year in which application for a quadrennial finding of reasonable diligence shall be filed with the water clerk pursuant to section 37-92-302 (1).

(5) In all proceedings for a change of water right and for approval of reasonable diligence with respect to a conditional water right, it is appropriate for the referee

and the courts to consider abandonment of all or any part of such water right or conditional water right.

Source: L. 69, p. 1205, § 1; C.R.S. 1963, § 148-21-17; L. 71, p. 1324, § 4; L. 73, p. 1523, : 1.

37-92-302. Applications for water rights or changes of such rights - plans for augmentation. (1) (a) Any person who desires a determination of a water right or a conditional water right and the amount and priority thereof, including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, a determination with respect to a change of a water right, approval of a plan for augmentation, or quadrennial finding of reasonable diligence, shall file with the water clerk in quadruplicate a verified application setting forth facts supporting the ruling sought, a copy of which shall be sent by the water clerk to the state engineer and the division engineer.

(b) Any person who wishes to oppose the application may file with the water clerk in quadruplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions. The water clerk shall mail a copy of such statement of opposition to the state engineer and the division engineer.

(c) Such statement of opposition must be filed by the last day of the second month following the month in which the application is filed.

(d) The fee for filing an application shall be twenty-five dollars; and for filing a statement of opposition, the fee shall be fifteen dollars. If more than one water right is requested in any application, a fee of five dollars for each additional right shall be assessed. No fee shall be assessed to the state of Colorado or any agency of its executive department under this subsection (1).

(2) The water judges of the various divisions shall jointly prepare and supply to the water clerks standard forms which shall be used for such applications and statements of opposition. These forms shall designate the information to be supplied and may be modified from time to time. Supplemental material may be submitted with any form. In the case of applications for a determination of a water right or a conditional water right, the forms shall require, among other things, a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the appropriation or proposed appropriation, the amount of water claimed, and the use or proposed use of water. In the case of applications for a change of water right, the forms shall require, among other things, a description of the water right or conditional water right for which the change is sought, the amount and priority of the water right or conditional water right, and a description of the proposed change of water right. In the case of applications for approval of a plan for augmentation, the forms shall require a complete statement of such plan. In the case of applications which will require construction of a well, no decision, ruling, or order granting a water right shall be entered until the application shall be supplemented by a permit to construct a well or evidence of its denial by the state engineer pursuant to section 37-90-37 or evidence of the state engineer's failure to grant or deny such a permit within six months after application to the state engineer therefor.

(3) (a) Not later than the fifteenth day of each month, the water clerk shall prepare a resume of all applications in the water division which have been filed in his office during the preceding month. The resume shall give the name and address of the applicant, a de-

scription of the water right or conditional water right involved, and a description of the ruling sought.

(b) Not later than the end of such month, the water clerk shall cause such publication to be made of each resume or portion thereof in a newspaper or newspapers as is necessary to obtain general circulation once in every county affected, as determined by the water judge.

(c) Not later than the end of such month, a copy of such resume shall be mailed to each person who the referee has reason to believe would be affected or who has requested the same by submitting his name and address to the water clerk. The water clerk shall maintain a mailing list of such names and addresses so submitted, and persons desiring to have their names and addresses retained on such list must resubmit the same by January 31. Persons who have not so resubmitted their names and addresses shall not be retained on such list, but they may submit their names and addresses at any time thereafter for inclusion on the list subject to the foregoing. In order to obtain a copy of a resume for a particular month, a person's name and address must be received not later than the fifth day of the month of publication of the resume. A fee of twelve dollars shall be payable for inclusion on the mailing list for a calendar year prorated at one dollar per month for a lesser period. A copy of the resume shall be furnished without charge to the state engineer and the appropriate division engineer.

(d) All publications provided for in paragraph (b) of this subsection (3) may be augmented, in the discretion of the water judge, by notices broadcast over any or all standard radio, FM radio, TV stations, and cable television. Such broadcast notices shall make reference to locations or publications wherein details of the subject matter of the notices are located.

(4) The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board, and other state agencies. The substance of such consultation shall be reduced to writing by the referee, a copy sent to the consulted person or agency, and a copy filed in the proceedings before any ruling therein shall be entered or effective. In all future applications, including those contested applications pending on May 26, 1971, wherein no ruling by the referee or water court has been entered and the water court requests the same, or wherein a ruling by the referee is being contested before the water court and the water court requests the same, a written summary of the consultation by the referee with the division engineer shall be made by the referee and filed in each such proceeding before any ruling shall be entered or effective. A copy of such summary shall be filed with the division engineer.

(5) Persons alone or in concert may initiate and implement plans for augmentation including water exchange projects. Water conservancy districts, irrigation districts, mutual or public ditch and reservoir companies, municipalities, or other entities which are governed by a board of directors or similar body may initiate and implement plans for augmentation for the benefit of all water users within their boundaries.

Source: L 69, p. 207, § 1; C.R.S. 1963, § 148-21-18; L. 70, p. 431, § 3; L. 71, pp. 1321, 1323, 1326, 1330; §§ 1, 1, 1, 1; L. 73, pp. 1522, 1523, §§ 3, 2.

37-92-303. Rulings by the referee. (1) Within sixty days from the last day on which statements of opposition may be filed with respect to a particular application, unless such time is extended by the water judge for good cause shown, the referee shall make his ruling on the application unless he determines to rerefer the matter to the water judge as specified in subsection (2) of this section. The ruling may disapprove the application in whole or in part in the discretion of the referee even though no statements of opposition have been filed. The ruling of the referee shall give the names of the applicants with respect to each water right or conditional water right involved, the location of the point of diversion or place of storage, the means of diversion, the type of use, the amount and priority, and other pertinent information. In the case of a plan for augmentation, such ruling shall include a complete statement of such plan as approved or disapproved. The ruling shall be filed with the water clerk and becomes effective upon such filing, subject to judicial review pursuant to section 37-92-304. A copy of the ruling shall be mailed by the water clerk by certified or registered mail to the applicant, to each person who has filed a statement of opposition, to the state engineer, and to the division engineer.

(2) In the case of applications with respect to which a statement or statements of opposition have been filed, the referee may determine in his discretion not to make a ruling as specified in subsection (1) of this section and to rerefer the matter to the water judge for a decision as provided in this article. Such rereferral shall be accomplished by order of the referee which shall be entered within the month following the last month in which statements of opposition may be filed with respect to the particular application. A copy of the order shall be mailed by the water

clerk by registered mail to the applicant and to each person who has filed a statement of opposition.

Source: L. 69, p. 1208, § 1; C.R.S. 1963, § 148-21-19; L. 71, p. 1327, § 2.

37-92-304. Proceedings by the water judge. (1) On the first Tuesday of March and September in division 1, the second Tuesday of March and September in division 2, the third Tuesday of March and September in division 3, the fourth Tuesday of March and September in division 4, the first Tuesday of April and October in division 5, the second Tuesday of April and October in division 6, and the third Tuesday of April and October in division 7, the water judge for the particular division shall set for hearing matters in which protests have been filed or orders of rereferral entered by the referee during the preceding six calendar months. Such matters shall generally be considered by the water judge in chronological order; however, the dates and times of hearings shall be adjusted by the water judge at his discretion for the convenience of persons involved or for other reasonable cause.

(2) Within twenty days after the date of mailing thereof, any person who wishes to protest a ruling of the referee shall file a written protest with the water clerk and a copy thereof with the referee. Such protest shall clearly identify the ruling being contested and shall state the factual and legal grounds for the protest. Promptly after the same is filed, a copy of such protest shall be sent by the water clerk by certified or registered mail to the applicant and to persons who have filed statements of opposition; except that no copy need be sent to the protestant. Upon filing of such a protest, the protestant shall pay a filing fee of twenty dollars plus an additional amount which is sufficient to cover the costs of mailing the copies thereof as required in this subsection (2); ex-

cept that no person who has already entered an appearance, either as an applicant or as an objector, in the matter in which the protest is made shall be charged the twenty-dollar filing fee.

(3) As to the rulings with respect to which a protest has been filed and as to matters which have been rereferred to the water judge by the referee, there shall be hearings conducted in accordance with the Colorado rules of civil procedure; except that no pleadings shall be required. The court shall not be bound by findings of the referee. The division engineer shall appear to furnish pertinent information and may be examined by any party, and if requested by the division engineer, the attorney general shall represent the division engineer. The applicant shall appear either in person or by counsel and shall have the burden of sustaining the application, whether it has been granted or denied by the ruling or been rereferred by the referee and in the case of a change of water right the burden of showing absence of any injurious effect alleged in the protest or a statement of opposition. All persons interested shall be permitted to participate in the hearing either in person or by counsel if they enter their appearance in writing prior to the date on which hearings are to commence as specified in subsection (1) of this section. Each interested person, if such person has not already appeared in the matter in which the hearing is to be held and paid an appropriate filing or docket fee, shall pay a docket fee of twenty dollars upon filing the entry of appearance under this subsection (3). Such entry of appearance shall identify the matter with respect to which the appearance is being made. Service of copies of applications, statements of opposition, protests, or any other documents is not necessary for jurisdictional purposes, but the water judge may order service of copies of any docu-

ments on any persons and in any manner which he deems appropriate.

(4) If an applicant, a person who has filed a statement of opposition, or a protestant requests, the hearing shall be conducted by the water judge in the district court of the county in which is located the point of diversion of the water right or conditional water right involved. In case the hearing involves points of diversion located in more than one county, the hearing shall be conducted by the water judge in the district court of that county in which is located the major part, as determined by the water judge, of the diversions or proposed diversions involved.

(5) A decision of the water judge with respect to a protested ruling of the referee shall either confirm, modify, reverse, or reverse and remand such ruling, and in the case of the modification of a ruling the decision may grant a different priority than that granted by the referee and may specify its own terms and conditions with respect to a change of water right or plan for augmentation. A decision of the water judge in regard to a matter which has been rereferred by the referee shall dispose fully of such matter and may contain such provisions as the water judge deems appropriate. The water judge shall confirm and approve by judgment and decree a ruling of the referee with respect to which no protest was filed, but the water judge may reserve, or reverse and remand, any such ruling which he deems to be contrary to law.

(6) Any decision of the water judge as specified in subsection (5) of this section dealing with a change of water right or a plan for augmentation may include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others during any hearing commencing in the two calendar year succeeding

the year in which the decision is rendered, and such decision may contain any other provision which the water judge deems proper in determining the rights and interests of the persons involved. All decisions of the water judge shall become a judgment and decree as specified in this article.

(7) Judgments and decrees shall be entered promptly with respect to matters that have been heard and matters in which no protest has been filed or order of rereferral entered. A judgment and decree may be confined to one matter or may include more than one matter at the discretion of the water judge. The judgment and decree shall give the names of the applicants with respect to each water right or conditional water right involved, the location of the point of diversion or place of storage, the means of diversion, the type of use, the amount and priority, and other pertinent information. In the case of a plan for augmentation, the judgment and decree shall contain a complete statement of the plan. In the case of applications for determination of water rights or conditional water rights, the judgment and decree shall state the date of the filing of the application.

(8) A copy of such judgment and decree shall be filed with the state engineer and the division engineer, and a copy thereof shall be provided by the water clerk to any other person requesting same upon payment of a fee of one dollar per page, not to exceed a maximum of ten dollars. Promptly after receiving a judgment and decree, the division engineer and the state engineer shall enter in their records the determinations therein made as to priority, location, and use of the water rights and conditional water rights, and they shall regulate the distribution of water accordingly.

(9) Appellate review shall be allowed to the judg-

ment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed.

(10) Clerical mistakes in said judgment and decree may be corrected by the water judge on his own initiative or on the petition of any person, and substantive errors therein may be corrected by the water judge on the petition of any person whose rights have been adversely affected thereby and a showing satisfactory to the water judge that such person, due to mistake, inadvertence, or excusable neglect, failed to file a protest with the water clerk within the time specified in this section. Any petition referred to in the preceding sentence shall be filed with the water clerk within three years after the date of the entry of said judgment and decree. The water judge may order such notice of any such correction proceedings as he determines to be appropriate. Any order of the water judge making such corrections shall be subject to appellate review as in other civil actions.

(11) If any application is granted in whole or in part by the referee pursuant to this article, any person who asserts that he will be damaged by any acts authorized by such ruling may, upon payment of filing fee of twenty dollars plus an additional amount which is sufficient to cover the costs of service of such notice of the proceedings, by personal service or otherwise, as the court may direct, within thirty days after the issuance thereof apply ex parte to the water judge of such division for an order directed to the applicant to show cause why the operation of such ruling should not be stayed until judicial review thereof under the provisions of this section. Such application shall be verified, shall have attached to it a copy of the ruling of the referee, and shall allege facts

upon the basis of which it is claimed that damages are likely to result from the acts authorized thereby. If the application for an order to show cause is found to be in proper form, the court shall issue its order to show cause and set the same down for hearing. At the hearing on the order to show cause, the party to whom such order is directed shall have the burden of proving that no material damage is likely to result from the operations authorized by the ruling of the referee. The court shall thereupon make its findings, and, if it finds that material damage is likely to result to the party at whose instance the show cause order was issued prior to the time that judicial review of the ruling of the referee can be had pursuant to the provisions of this section, he shall stay the effectiveness of said ruling pending such judicial review.

Source: L. 69, p. 1208, § 1; C.R.S. 1963, § 148-21-20; L. 70, p. 432, § 4; L. 71, pp. 1327, 1328, §§ 3, 4; 73, p. 1525, § 1.

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (1) In the determination of a water right the priority date awarded shall be that date on which the appropriation was initiated if the appropriation was completed with reasonable diligence. If the appropriation was not completed with reasonable diligence following the initiation thereof, then the priority date thereof shall be that date from which the appropriation was completed with reasonable diligence.

(2) Subject to the provisions of this article, a particular means or point of diversion of a water right may also serve as a point or means of diversion for another water right.

(3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner

of or persons entitled to use water under a vested water right or a decreed conditional water right. If it is determined that the proposed change or plan as presented in the application would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect.

(4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences;

(b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use of diminution of return flow to the detriment of other appropriators;

(c) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(d) Such other conditions as may be necessary to protect the vested rights of others.

(5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used, and such substituted water shall be accepted by the senior appropriator in sub-

stitution for water derived by the exercise of his decreed rights.

(6) In the case of an application for determination of a water right or a conditional water right, a determination with respect to a change of a water right or approval of a plan for augmentation, which requires construction of a well, the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit, and may grant a conditional decree unless a denial of such permit was justified under said section, and in case a final decree or conditional decree is granted by the court, the state engineer shall issue said permit.

Source: L. 69, p. 7211, § 1; C.R.S. 1963, §148-21-21; L. 71, p. 1324, § 2.

37-92-306. Priorities junior to prior awards—when. With respect to each division described in section 37-92-201, the priority date awarded for water rights or conditional water rights adjudged and decreed on applications for a determination of the amount and priority thereof filed in such division during each calendar year shall establish the relative priority among other water rights or conditional water rights awarded on such applications filed in that calendar year; but such water rights or conditional water rights shall be junior to all water rights or conditional water rights awarded on such applications filed in any previous calendar year and shall also be junior to all priorities awarded in decrees entered prior to June 7, 1969, or decrees entered in proceedings which were pending on such date; except that, with respect to water rights which are diverted by means of wells, the priorities for which have not been established or sought in any such decree or proceeding, if the person claiming such a water right files an application for determination of water right

and priority not later than July 1, 1972, and such application is approved and confirmed, such water right, subject to the provisions of section 37-92-305 (1), shall be given a priority date as of the date of actual appropriation and shall not be junior to other priorities by reason of the foregoing provision.

Source: L. 69, p. 1212, § 1; C.R.S. 1963, §148-21-22; L. 71, p. 1333, §1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-949

MARY AKIN, *et al*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

The States appearing as signatories on this amici curiae brief respectfully request this Court to issue its writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in the case captioned below as *United States of America v. Mary Akin, et al.*, Case No. 73-1807, reported at 504 F.2d 115 (1974) (attached hereto as Appendix A). The United States District Court for the District of Colorado issued oral findings of fact and conclusions of law, a transcript of which is attached hereto as Appendix B. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by the United States Court of Appeals on November 12, 1974. A Petition for Writ of Certiorari was filed with this Court on or about February 1, 1975 by the Attorney General of the State of Colorado.

A. THE COURT'S HOLDING

The United States Court of Appeals for the Tenth Circuit held that the doctrine of abstention did not support the United States District Court's dismissal of the complaint of the United States seeking an adjudication of its claim for water rights in the San Juan River Basin of Colorado. The Court further held that 43 U.S.C. §666 (the McCarran Amendment) did not divest the Federal District Court from assuming jurisdiction over water rights adjudications.

B. THE INTEREST OF THE STATES NAMED HEREIN

Amici curiae believe that this case presents solemn issues regarding the delicate relationship between the federal government and the individual states. The resolution of the questions of the applicability of abstention and comity will have precedential impact beyond the boundaries of the State of Colorado. Additionally, this case may have adverse consequences upon the water right determination and administration processes in all the Western States.[1] The potential harm of the Court of Appeals' decision and the importance of the issues involved herein are the bases for the appearance of amici curiae to pray that a writ of certiorari be issued.

As the settlement of the West progressed, the States named herein as amici curiae developed comprehensive and prudent systems for the determination and administration of water rights. The scarcity of this keystone resource compelled state action to insure certainty and efficiency in the establishment of water rights and in the regulation of the exercise of those rights. Although the doctrine of prior appropriation is the bedrock of the Western States' de-

[1] Since the reserved water rights theory has no application in the State of Texas, it joins as an amicus curiae for the sole purpose of upholding the doctrines of abstention and comity.

signs, divergent economic and political policies and the particularities of the water situations in each state have led to a variety of individual systems. Generally, these designs for water right determination and administration reflect a degree of sophistication achievable only after decades of trial and error and of legislative and judicial development.

If the decision of the Court of Appeals is allowed to stand, the federal judicial system will become a second forum for the determination and administration of water rights. The special and peculiar capabilities of all the Western States' schemes will be undermined by the existence of this separate and distinct process.

Comity is also an issue of significance to all the States named herein. In appropriate situations, the doctrine of comity may alone be sufficient basis for deference of jurisdiction to a pending state proceeding. The Court of Appeals failed to consider comity as a ground for dismissal even though it recognized that the District Court had, in part, dismissed the complaint because of comity. Comity identifies the concept that federal courts should give consideration to the sovereign status of the individual states. The States are concerned with the balance between state jurisdiction and federal jurisdiction; thus, the recognition of comity as a proper basis for dismissal of this action is an additional interest of amici curiae.

The issue of abstention is also of primary importance to the States named herein as amici curiae. The doctrine of abstention holds that federal courts may exercise their discretionary equitable powers and refuse jurisdiction in certain cases. Recognition of the proper exercise of the doctrine of abstention is vital to healthy federal-state relations. The States have utmost concern that the doctrine of abstention be preserved in its full scope.

The interests of the Western States, which involve cardinal issues of federalism and concern the future regulation of the essential resource of water support the issuance of a writ of certiorari.

C. THE ADVERSE EFFECT OF THE COURT'S DECISION

The decision of the Court of Appeals of the Tenth Circuit divides the water right determination and administration procedure between two forums. The state system will lose much of the certainty, utility, and valuable intactness that has developed over decades of experience. For the first time, the federal district courts will be burdened with developing an adequate procedure for determining and administering water rights. There is no sound reason for circumventing the state systems and clogging the federal courts with these complex and cumbersome matters. The efficiency and reliability so necessary to assure the wise use of the limited resource of water will be eradicated. Duplicative determination forums not only create uncertainty and waste but also place unnecessary burdens on the states in administering their waters and on individuals who must suffer the extra time and expense of defending their water rights in federal court.

Assumption of jurisdiction by the federal judiciary forebodes chaos in water right administration. Water rights are interrelated, and frequently day to day management of the rights to this fluctuating and limited resource is required. The federal court will be confronted with numerous and complex administrative problems including perplexing jurisdictional difficulties in regard to rights, orders, and administrative decisions emanating from the state system. The authority and definiteness of the state process will be impaired by the presence of federally-created rights and the jurisdictional barriers surrounding

those rights. Further federal-state jurisdictional battles are sure to ensue and the allocation and management of water may suffer through years of incertitude.

In light of the importance of water to the Western States, this threat of confusion should be quickly extinguished by withholding federal jurisdiction and permitting the state forum to proceed. The Supreme Court of the United States should issue a writ of certiorari in order to forestall the potential damage to the water right determination and adjudication systems of all the Western States.

In holding that the doctrine of abstention does not support dismissal of the federal action, the Court of Appeals misconceived the dimensions of abstention and adopted a constricted and partial view of the doctrine. Should this decision be allowed to stand, it will mark a serious departure from the well-established applications of the doctrine and may lead to further duplications and disruptive controversies in the federal-state jurisdictional area outside of water matters.

Lastly, the decision of the United States Court of Appeals is in derogation of the long-standing federal policy of deference to state governments in water matters. If this decision is allowed to stand, the doctrine of comity will be dealt a near fatal blow and the door will be open to more frequent and more intense federal-state disputes. A writ of certiorari should be granted in order that this Court may consider the deleterious impact of the decision below.

II. JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 2, 1974. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on November 12, 1974, and a petition for Writ of Certiorari was filed by the Attorney Gen-

eral of the State of Colorado within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

III. QUESTION PRESENTED

Should a federal district court defer to a competent state forum the resolution of federal water right claims which are capable of complete determination and administration in a state proceeding?

IV. STATUTORY PROVISIONS INVOLVED

43 U.S.C. § 666, 66 Stat. 560, commonly referred to as the McCarran Amendment, reads as follows:

> 666. Suit against the United States.—(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit

shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of the States to the use of the water of any interstate stream. (July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560.)

Also involved is the Colorado Water Right Determination and Administration Act of 1969, Colorado Revised Statutes 1973, 37-92-101, *et seq.*, as amended, and to the extent of the amici curiae's participation, the statutory water right determination and administration designs of each of the individual states are relevant.

V. STATEMENT OF THE CASE

This is a water right case which was instituted on November 14, 1972, by the United States in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1345. It seeks the adjudication of all water rights in the San Juan River Basin in Colorado held by the United States in its own capacity and as trustee for the Ute Mountain Ute and the Southern Ute Indian Tribes and, in particular, the adjudication of all the claimed reserve water rights of the United States. Additionally, the United States prays for the appointment of a Water Master to administer the respective rights of all users in the waters adjudicated.

The reserved water rights asserted by the United States are or may be used in connection with Mesa Verde National Park, the Yucca House National Monument, the Hovenweep National Monument, Bureau of Reclamation Projects within the State of Colorado, and lands reserved

by the United States including the Indian Reservations in Colorado.

There are approximately twelve hundred named defendants and the following intervening defendants: The Colorado River Water Conservation District, the City and County of Denver by its Board of Water Commissioners, the Southwestern Water Conservation District, The Mancos Water Conservancy District and the Southeastern Colorado Water Conservancy District. The Southern Ute Indian Tribe, the Ute Mountain Ute Indian Tribe, and the National Tribal Chairmen's Association appeared as amici curiae by the Native American Rights Fund.

Pursuant to the McCarran Amendment, the Southwestern Colorado Water Conservation District joined the United States in a pending Colorado water court adjudication on January 3, 1973. The state proceeding is fully capable of adjudicating all the water right claims which the United States sought to advance in federal court. Additionally, Colorado has a comprehensive design for the administration of all water rights. The United States is presently involved in seven state court actions in Colorado adjudicating claims similar to those asserted in the instant case pursuant to state procedure.

After consideration of the practicality and expertise of the Colorado forum and the harm involved in the assumption of jurisdiction, the United States District Court dismissed the action brought by the United States on the grounds of abstention and comity. The judgment rendered by the district court was reversed by the United States Court of Appeals for the Tenth Circuit on the ground that this case was outside the narrow areas in which the doctrine of abstention may be exercised. A Petition for Rehearing and Suggestion for Rehearing *en banc* by various intervening defendants was denied by that court on November 12, 1974.

VI. ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A. COMITY COMPELS DISMISSAL OF THIS ACTION BECAUSE THE ASSUMPTION OF JURISDICTION BY THE DISTRICT COURT WOULD HAVE A SIGNIFICANTLY ADVERSE IMPACT UPON FEDERAL-STATE RELATIONS.

1. *A state proceeding fully capable of adjudicating federal water claims is pending. The assumption of federal jurisdiction complicates, confuses and harms the historic determination and administration of water rights by state processes.*

If the true dimensions of the concept of comity are to be given full breadth, comity must be sustained as an appropriate basis for the dismissal of this suit. Comity permits a federal district court to repair the parties to a state court proceeding when the refusal of jurisdiction by the federal court will enhance federal-state relations. The doctrine is an inherent product of the federalistic nature of the governmental system of the United States of America.

> ". . . the notion of 'comity,' that is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by man as "Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of

> 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. *What the concept does represent is the system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States.* It should never be forgotten that this slogan, 'Our Federalism,'' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.'' [Emphasis added.] *Younger v. Harris,* 401 U.S. 37, 44-45 (1971).

When the executive branch of the Federal government fails to respect ''Our Federalism'' and the rightful role of state forums in water matters is ignored, the federal judiciary should use the doctine of comity to avoid the theatened injury to federal-state relations.

Exercising their sovereign powers, the various states of our Union have adopted their own water right determination and administration systems. State procedures, either administrative or judicial, have been the almost exclusive method for the determination of water rights including rights of the United States of America. Many of these systems, like that of Colorado, have evolved out of a century or more of experience in water right affairs and are responsive to the hydrological conditions, economic and social factors, and the special problems of each of the states.

The federal government does not have a system of

water right determination. It has followed a concerted course of action in deferring to state law and state forums in water right matters. Numerous statutes, Congressional actions, administrative policies, and judicial decisions reflect a national policy of establishing and administering federal water rights within the state water right systems. See, *In re Green River Drainage Area,* 147 F. Supp. 127 (D. Utah 1956) and the citations therein at 145. Such deference has created a largely harmonious, cooperative, effective working relationship between the state governments and the central sovereign in water matters. Unless the doctrine of comity is respected and the exercise of comity is permitted in this case, the concordance of the states and the federal government in water right determination matters will be severely threatened.

2. *The McCarran Amendment, as this Court acknowledged, expresses a national policy that state forums be utilized for the determination and administration of federal water rights.*

The historic deference of the federal government to state procedures in water right matters was supported and advanced in *United States v. District Court in and for the County of Eagle* (hereinafter *Eagle County*), 401 U.S. 520 (1971), and its companion case *United States v. District Court in and for Water Division No. 5* (hereinafter Division 5), 401 U.S. 527 (1971). After consideration of the McCarran Amendment and its legislative history, the Supreme Court of the United States held that even the reserved right claims of the United States could be adequately adjudicated in Colorado's courts despite the potential inconsistencies between the federal claims for those rights and Colorado state law. These prudent holdings avoided the obviously adverse consequences which result from the bifurcation of the water right determination pro-

cedure. The holding of the United States Court of Appeals is a severe retrogression from the enlightened position enunciated in *Eagle County* and *Division 5* and is unwarranted.

The McCarran Amendment, 43 U.S.C. § 666, furthers the concept of comity. It permits the joinder of the United States in state water adjudications thus promoting the utility of the state proceedings by assuring that *all* the parties owning or in the process of acquiring water rights on a particular stream will be before the court. The Court of Appeals' decision in the instant case promotes the circumvention of the McCarran Amendment and effectively destroys it. Over the past century, the entire fabric of western development and, in particular, agicultural, industrial, municipal and domestic activities have become dependent upon the orderly determination of the relative priority of water rights and the administration of those rights from day to day in accordance with the highly varible, and sometimes almost nonexistent, supply of water. To force the federal court to institute an unnecessary, duplicative and burdensome proceeding ignores the policy of comity and vitiates the intent of the McCarran Amendment.

The McCarran Amendment also permits the joinder of the United States for the administration of water rights in state forums. Thus Congress has enunciated an all-inclusive policy that all facets of federal water claims and water rights are within the purview of the state processes. When contrasted with the absence of any federal administrative experience or design, the McCarran Amendment may properly be interpreted as a statement of intent to favor the utilization of state forums for the determination and administration of federal water claims.

If the United States District Court is forced to ignore the doctrine of comity and to assume jurisdiction in this

case, all of the unitary water right determination systems of the Western States may be jeopardized. The scarcity of water in the arid and semiarid western States dictates that a water allocation scheme provides freedom from the doubts and disorders which could result from a bifurcated process. The interference of the federal judicial process in the determination and administration of water rights is antithetical to the efficiency, reliability and integrity present in the state schemes. In part, the success of these state systems has derived from the cooperation of the federal government based on both statutory requirements and sensible administrative decisions. The benefits of the unitary state schemes which have fostered harmonious relations in the controversial area of water right determination should not be cast aside by the assumption of jurisdiction. A rightful respect for the functions of state government compels the application of the doctrine of comity to dismiss the federal government's action.

B. THE COURT OF APPEALS ERRED BY SO NARROWLY DEFINING THE ABSTENTION DOCTRINE. A MULTITUDE OF FACTORS SUPPORT THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION TO ABSTAIN.

The doctrine of abstention vests with the federal court the discretionary authority to dismiss an action even though the court is possessed of requisite jurisdiction. Abstention shares many of the considerations of comity but may be invoked for reasons other than comity. The landmark abstention decision is *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Two of the fundamental legal principles of the doctrine as enunciated in *Pullman, supra,* are relevant to this case. First, the power to stay or defer action is to be exercised in furtherance of fostering the harmonius relations between state and federal authorities. Second, in the absence of a show-

ing that the state adjudicatory process cannot be pursued with full protection of the claims, the court should exercise its discretion to stay its hand.

The decisions which have followed *Pullman, supra,* have given greater breadth to the doctrine of abstention. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), noted the appropriateness of abstention when an adequate and comprehensive state regulatory system existed. When the federal right is "entangled in a skein" of a state regulatory system, abstention has been common. *Gay v. Board of Registration Commissioners,* 466 F.2d 879, 884 (6th Cir., 1972); *See, Alabama Public Service Commissioners v. Southern Railway Co.,* 341 U.S. 341 (1951). The Federal water claims are indisputably entangled in the law and the regulatory system of the state. *United States v. Hennen,* 300 F. Supp. 256 (D. Nev. 1968); *Avondale Irrigation District v. North Idaho Properties, Inc.,* 96 Idaho 1, 523 P.2d 818 (1974).

Furtherance of "cooperative judicial federalism" may be the sole ground upon which abstention may be exercised. *Lehman Bros. v. Schein,* — U.S. —, 94 S.Ct. 1741 (1974); *Alabama Public Service Comm. v. Southern Railway Co.,* 341 U.S. 341 (1951); *Simmons v. Jones,* 478 F.2d 321 (5th Cir. 1973); *Indiana State Employees Association, Inc. v. Boehning,* 357 F. Supp. 1374 (S.D. Ind. 1973). However, numerous other rationales which are also present in the instant case have been cited as supporting the invocation of the abstention doctrine:

1. The subject matter of the lawsuit is an unique state resource which is of great concern to the state. *Kaiser Steel Corp. v. W. S. Ranch Co.,* 391 U.S. 593 (1968); *Union Water Supply Corp. of Garciasville v. Vaughn,* 355 F. Supp. 211 (S.D. Tex. 1972)

2. The complexity of the subject matter and the cap-

ability and historic expertise of the state system. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570 (1941).

3. The pendency of a parallel state proceeding. PPG *Industries, Inc. v. Continental Oil Co.*, 478 F.2d 674 (5th Cir. 1973); *Indiana State Employees Assoc., Inc. v. Boehning*, 357 F. Supp. 1374 (S.D. Ind. 1973).

4. The onerous effects of jurisdiction upon the federal docket and judicial resources. [WRIGHT, LAW OF FEDERAL COURTS (2d ed. 1970) at 196.]

In opposition to these factors, the United States asserted only its victory in the race to the courthouse and the advancement of a national interest. The inherent value of the courthouse race is meaningless and artificial in comparison with the substantive factors cited above. The claim that the assertion of a national interest makes abstention inappropriate is vitiated by the United States Supreme Court's declaration that the Colorado State system is fully adequate to hear all federal water right claims, *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971).

Although abstention is a doctrine of limited application, it should not be so narrowly interpreted as to be decimated. The Court of Appeals failed to appreciate that this case constitutes a federal interference with a state regulatory scheme as in *Burford, supra.* The issues of the case concern the existence, scope and nature of federal reserved water right claims in Colorado and, since rights created under state law are before the court, important and novel questions of state law are presented as in *Kaiser, supra.* The Court of Appeals erred not only by restricting abstention to such limited areas but by failing to realize that

abstention is supportable even within the limited areas it delineated.

The doctrine of abstention is a necessary tool to facilitate a proper balance between the jurisdictional spheres of the federal and state governments. Where a state's regulatory system provides sophisticated procedures for determining and administering all water rights, and absolutely no system exists at the federal level, a federal court should abstain. Additionally, the entanglement of the federal claims and state law, the importance of water as an unique state resource, the complexity of the regulatory system, the avoidance of a prolonged, complex litigation in federal court, and the existence of a state proceeding all urge the application of abstention in this case. The scales of justice are decidedly tipped in favor of abstention.

CONCLUSION

The undersigned States respectfully submit that the United States Court of Appeals for the Tenth Circuit erred in its view of the doctrine of abstention as applied to this case and further erred by not considering the doctrine of comity. Both of these important legal principles support the Federal District Court's dismissal of this action.

Water right determination is a paramount state concern. The unique systems developed by the states should not be frustrated by the interference of the federal courts, especially when the doctrines of comity and abstention are so particularly appropriate as bases for dismissal of the federal action. The magnitude of the federal-state issues involved and the importance of water-right systems to the states evidence the significance of this case. It is respect-

fully submitted that this Court should issue its Writ of Certiorari to review the judgment of the United States Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

MARY AKIN ET AL.,

Defendants-Appellees.

No. 73-1807

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Submitted Aug. 19, 1974.

Decided Oct. 2, 1974.

Rehearing Denied Nov. 12, 1974.

Walter Kiechel, Jr., Deputy Asst. Atty. Gen. (Wallace H. Johnson, Asst. Atty. Gen., and Edmund B. Clark, Donald W. Redd, and Lawrence E. Shearer, Attys., Dept. of Justice, Washington, D.C., on the brief), for plaintiff-appellant.

John E. Bush, Deputy Atty. Gen. (John P. Moore, Atty. Gen., Clyde O. Martz, Raphael J. Moses, and James D. Geissinger, Special Asst. Attys. Gen., on the brief), for defendants-appellees The State Board of Agriculture and The Colorado Game and Fish Commission (Colorado Wildlife Commission and Colorado Board of Parks and Outdoor Recreation).

L. W. McDaniel, Durango, Colo., on the brief for defendant-appellee Southwestern Water Conservancy District.

Fairfield & Woods and Ireland, Stapleton, Pryor & Holmes, P. C., Denver, Colo., on the brief, for defendant-

appellee Mancos Water Conservancy District.

Fairfield & Woods, Denver, Colo., on the brief for defendant-appellee Southeastern Colorado Water Conservancy District.

Kenneth Balcomb, Glenwood Springs, Colo., for intervenor-appellee Colorado River Water Conservation District.

Thomas W. Fredericks, David H. Getches and Robert S. Pelcyger, Attys., Native American Rights Fund, Boulder, Colo., on the brief of amici curiae Southern Ute Indian Tribe, Ute Mountain Ute Indian Tribe and National Tribal Chairmen's Association.

George L. Zoellner, Kenneth L. Broadhurst, Glenn Saunders, Special Counsel and Jack Ross, Special Counsel, Denver, Colo., on the brief, for defendant-appellee City and County of Denver, acting by and through its Board of Water Commissioners.

Before HILL and DOYLE, Circuit Judges, and TALBOT SMITH*, District Judge.

WILLIAM E. DOYLE, Circuit Judge.

The questions presented in this appeal are, first, whether or not the District Court had jurisdiction to entertain this action which was instituted by the United States on its own behalf and on behalf of certain Indian tribes, or, secondly, assuming that the District Court had jurisdiction, whether the court should have abstained.

This is a water rights case which was instituted by the United States in the United States District Court for the District of Colorado. The action was brought on behalf of the United States and on behalf of the Ute Mountain and

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*Honorable Talbot Smith, United States District Judge, Ann Arbor, Michigan, sitting by designation.

Southern Ute Indian Tribes on November 14, 1972. It sought the adjudication of all water rights held by the United States in its own right and as trustee for the Ute Mountain and Southern Ute Indian Tribes in the San Juan Basin but, particularly, adjudication of all of its reserved rights in the San Juan River of Colorado. There are approximately 1200 named defendants.

The reserved rights asserted by the United States consist of those used in connection with Mesa Verde National Park, the Yucca House National Mounment, the Hovenweep National Monument, Bureau of Reclamation projects within the State of Colorado and lands reserved by the United States in Colorado. On behalf of the Indian tribes the United States claims further reserved rights for use of the Ute Mountain Ute Tribe and the Southern Utes on their reservations. The Colorado River Water Conservation District intervened as a defendant for the purpose of filing a motion to dismiss. Other intervenors followed including the Southeastern Colorado Water Conservancy District and the Board of Water Commissioners, City and County of Denver.

A subsequent suit was filed on January 3, 1973 in State Court by the Mancos Water Conservation District and the Southeastern Colorado Water Conservancy District embracing similar subject matter.** In this action the plaintiffs sought judicial determination of the identical water rights which the United States sought to have adjudicated. The United States was joined as a defendant in the state action pursuant to the so-called McCarran

**It has been called to our attention in an informal letter from one of the attorneys for defendants-appellees that this statement is incorrect. It is said that on that date Southwestern Colorado Water Conservation District filed a motion for the joinder of the United States under the McCarran Act. The record does not reveal the true fact. We note the suggested correction, even though it is not outcome determinative.

Amendment, 43 U.S.C. § 666, which allows a joinder of the United States in such a suit in state court.

The United States District Court's dismissal of the action was on the ground of the abstention doctrine and for reasons of "comity." In effect, therefore, the court's assumption was that it had jurisdiction.

Thus, the primary issue is whether the trial court erred in its decision to abstain. Inasmuch as the defendants-appellees also contend that the District Court lacked jurisdiction to hear the case, we shall take up that issue also.

I.
THE JURISDICTION QUESTION

The United States has alleged that jurisdiction in District Court was conferred by 28 U.S.C. § 1345 which gives to district courts original jurisdiction of all civil actions commenced by the United States except as otherwise provided.

The Colorado River Water Conservation District takes the position that 43 U.S.C. § 666, the McCarran Amendment, which gives consent to joinder of the United States "in any suit for the adjudication of rights to the use of water," etc.,[1] not only gives a state court jurisdiction over

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[1] The full text of this section reads as follows:
Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

the United States, it also, according to their further argument, excludes federal courts from assuming jurisdiction. We disagree.

The starting point in this analysis is Article III of the United States Constitution which extends the judicial power to controversies to which the United States shall be a party. Although this provision is not self-implementing, it does evidence the intention of the Framers to allow the United States to sue in its own courts. The statute, § 1345, *supra*, confirms this right of the United States.[2]

The rationale for the right of the United States to sue in federal court is expressed by Mr. Justice Story in his work, Story, The Constitution § 1674:

> It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the states.

The right was recognized from the earliest days in our history. The Judiciary Act of 1789 gave the district courts jurisdiction concurrent with that of the state courts "of all suits of a civil nature at common law or in equity," subject to a jurisdictional amount. The clear right of the United States to maintain actions asserting proprietary rights is discussed in H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at

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[2] Section 1345, supra, provides:
§ 1345. United States as plaintiff
Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil action, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

1301-09. The authors cite Cotton v. United States, 11 How. 229, 13 L.Ed. 675 (1850) as an example of the right of the United States to bring an action even without an authorizing statute. That was a trespass case.

With respect to the cases in which the government asserts a proprietary right, the authors say:

> The most striking recent examples of the assertion of proprietary rights of the United States, illustrating the magnitude of the interests that may be involved, were the much-disputed tidelands cases. Compare the motion of the United States for leave to intervene in Nebraska v. Wyoming, 304 U.S. 545 [58 S.Ct. 1035, 82 L.Ed. 1519] (1938). See Comment, Federal Fallbrook Case, 31 Tex.L.Rev. 404 (1953). See also the cases growing out of the oil scandals of the Harding administration. Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456 [47 S.Ct. 416, 71 L.Ed. 734] (1927); Mammoth Oil Co. v. United States, 275 U.S. 13 [48 S.Ct. 1, 72 L.Ed. 137] (1927).
>
> Closely related to the proprietary cases are those in which the United States has established its status as guardian of the Indian tribes and its standing in litigation to vindicate Indian rights. See *e.g.*, Heckman v. United States, 224 U.S. 413 [32 S.Ct. 424, 56 L.Ed. 820] (1912); United States v. Board of Comm'rs of Osage County, 251 U.S. 128 [40 S.Ct. 100, 64 L.Ed. 184] (1919); Cummings & McFarland, Federal Justice 250-317, 384-413 (1937).

H. M. Hart & H. Wechsler, The Federal Courts and The Federal System (2d ed. 1973), at 1302.

[1] The McCarran Amendment does not express an intention that the United States shall utilize state courts for the purpose of litigating its claims to water. It is said

by appellees that the original language of the Amendment contained a proviso which allowed the United States to remove to federal court any action in which it was a defendant within the scope of the waiver of sovereign immunity contained in the Amendment. The argument continues that since Congress dropped this proviso it follows that Congress intended to deprive the United States of its right to sue under § 1345. We disagree with the conclusion drawn. The McCarran Amendment merely allowed the United States to be *joined* in a state action in a case in which the United States owns water rights and is a necessary party to the suit. However, this falls short of furnishing by implication a repeal of § 1345 applicable to water cases. The Amendment's purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States. So, elimination of the removal proviso originally in the Amendment at most expressed congressional intent that where the United States is joined under the circumstances set forth in the Amendment it will not be allowed to frustrate the procedures in the state court. But the statute did not prohibit the United States from ever removing a water rights case to the federal court. If Congress had intended to force the United States to litigate its water cases in state courts, it could have done so by creating a water rights exception to § 1345. This it did not do either expressly or impliedly.[3]

The decisions in United States v. District Court,

[3] Senator McCarran himself stated that:

S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S. Rep. No. 755, 82d Cong., 1st Sess, at 9. See also United States v. District Court, County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed 2d 278 (1971); Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Nevada ex rel. Shamberger v. United States, 279 F.2d 699 (9th Cir. 1960).

County of Eagle, Colorado, 401 U.S. 520, 525, 91 S.Ct. 998, 28 L.Ed. 2d 278 (1971) and United States v. District Court, Water Division No. 5, Colo., 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed. 2d 284 (1971) do not support the appellees in their present contentions. The issue in both of these was whether the consent to suit of the United States by provision of the McCarran Amendment extended to reserved rights. The Supreme Court held that the Amendment did include this type of right and it followed that the United States could be joined as a *defendant* in a state water rights proceeding. But by so holding the Court did not impliedly say that the United States was prohibited from litigating its reserved water rights as a plaintiff in federal court. At most, it held that the McCarran Amendment authorized a concurrent jurisdiction with state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under § 1345, *supra*. This is far different from appellees' position that the Amendment prohibits the United States' litigation of these rights in federal court.

Nor does the decision of the United States District Court for the District of Utah in In re Green River Drainage Area, 147 F.Supp. 127 (D.Utah 1956) support appellees. This was a removal problem wherein the court held that the United States cannot automatically remove its water rights cases to federal court. The court conceded that the McCarran Amendment does not preclude such removal if it would otherwise be removable.

The Supreme Court in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed. 2d 15 (1963) considered a situation in which the United States was joined as a defendant in a private suit to determine water rights solely between certain private claimants and the United States. The Court held that the McCarran Amendment was not intended to apply to a private suit between the United States and a private party to determine conflicting water rights contentions.

We must then reject the notion that the McCarran Amendment partially repealed or modified § 1345, *supra*. This conclusion suggests that § 666 has a very limited coverage and is perhaps only procedural. It permits, but does not necessarily require, the United States being subjected to state jurisdiction.

II.
THE ABSTENTION QUESTION

Having concluded that the United States District Court's jurisdiction was unimpaired, the issue remains whether, considering the character of the case, the District Court was correct in its abstention stance. The Conservation Districts together with the Board of Water Commissioners, State Board of Agriculture and the Colorado Game and Fish Commission assert, of course, that abstention was proper. The United States complains that the court's action was erroneous.

It has been recognized from very early times that federal courts are not to decline the exercise of expressly granted jurisdiction. This principle was first expressed by Mr. Chief Justice Marshall in Cohens v. Virginia, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821). This oft-repeated statement was that "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." On its face this concept conflicts with the abstention principle which is that federal courts in the exercise of a wise discretion are to restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal Judiciary. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

A. *Guidelines*

[2] It is, of course, fundamental that the doctrine of abstention is to be applied in narrowly limited special circumstances. *See* Zwicker v. Koota, 389 U.S. 241, 248, 88 S.Ct. 391, 19 L.Ed. 2d 444 (1967) (citing Propper v. Clark, 337 U.S. 472, 492, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949). *See also* Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 2d 36 (1972); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed. 2d 1163 (1959); Meredith v. City of Winter Haven, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943).

B. *Applicable Areas*

1. The Supreme Court placed it in perspective when it said that it is an extraordinarily narrow exception to the rule that a federal court has a duty to adjudicate a controversy presented to it over which it has jurisdiction. *See* County of Allegheny v. Frank Mashuda Co., *supra,* and *see* Meredith v. City of Winter Haven, *supra.* It is within this narrow scope that we examine the various cases which have applied the abstention principle.

One facet of the abstention doctrine is that which seeks to give a state court full opportunity to dispose of a case which is potentially governed by state law before entertaining it and deciding it as a constitutional law question. *See* Railroad Commission of Texas v. Pullman Company, *supra,* a case in which the parties being regulated sought an injunction against enforcement of an order of the state regulatory agency.

Ours is not a case which presents constitutional questions and state questions, both of which show capability for disposing of the case whereby the state decision could obviate the necessity for a constitutional law decision.

2. A second abstention category is exemplified in Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87

L.Ed. 1424 (1943), which holds that federal courts are not to interfere with state regulatory schemes; that they are to refrain from anticipating a constitutional question and interfering with the state regulatory agency when it is engaged in administering state law. *See* Alabama Public Service Comm. v. Southern Ry. Co., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951); Hawks v. Hamill, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610 (1933); 1A J. Moore, Moore's Federal Practice § 0.203 [1]; C. Wright, Law of Federal Courts 200 (2d ed. 1970).

Here the federal court is not short-circuiting or interfering with efforts of a state administrative regulatory system, whereby the *Burford* rule could operate.

3. A further recent application of abstention is in cases in which a novel and important issue of state law is presented. *See* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 88 S.Ct 1753, 20 L.Ed.2d 835 (1968). *Kaiser* was a New Mexico eminent domain and water case. It concerned alleged inconsistency between a New Mexico statute and the New Mexico Constitution. Based on the fact that this was a novel and highly important question for the State of New Mexico, it was ruled that abstention was there appropriate. This holding was not dissimilar from Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). *Compare* County of Allegheny v. Frank Mashuda Co., *supra*. The fact, however, that both *Kaiser* and our case involve water rights does not render *Kaiser* determinative.

C. *The Race to the Courthouse.*

[3] The Colorado litigants also argue strenuously that this case must not be determined by who wins the race to the courthouse. This is a recurring contention in

cases in which state and federal courts have concurrent jurisdiction over a property case. True, the race idea has no intrinsic attractiveness. At the same time, it must be recognized that priority of filing has validity in the situation in which concurrent jurisdiction exists. The priority of the court which first acquires jurisdiction over the subject matter is entitled to recognition, and where the plaintiff has selected the forum and has filed first, his right to try his case in that court is not to be lightly dismissed.

The priority principle is held to apply where a federal and state court have concurrent jurisdiction and the action is *in rem*. *See* Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935); Kline v. Burke Constr. Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922); Palmer v. Texas, 212 U.S. 118, 29 S.Ct. 230, 53 L.Ed. 435 (1909); Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867 (1893); Gay v. Brierfield Coal & I. Co., 94 Ala. 303, 11 So. 353 (1891); Crosby v. Spear, 98 Me. 542, 57 A. 881 (1904); Rogers & B. Hardware Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S.W. 57 (1896); 20 Am.Jur.2d, Vol. 20 § 135, p. 485. And so the priority factor is entitled to be weighed in the abstention scale.

D. *Effect on Abstention of United States as Plaintiff*

We next consider (on the decision to abstain) the effect of the presence of the United States as a party plaintiff in the action. There is a dearth of authoritative case law bearing directly on the point. The most helpful decision is that of the Supreme Court in Leiter Minerals v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). The essential issue in that case was whether the United States owned minerals on lands, the surface of which it owned. A private party had claimed the minerals

in a state court action against the lessee of the United States. Thereupon, the United States filed an action in the United States District Court for the Eastern District of Louisiana. It sought to quiet title and to enjoin the adverse claimant in state court from prosecuting its action. The section of the Judicial Code which prohibits injunctions against State Court actions, 22 U.S.C. § 2283, was interposed. But the Supreme Court held that it was inapplicable to the United States when it was the suitor. In reaching this result the statute was ruled to be ambiguous and not susceptible to imputing congressional intent to make it applicable to the United States.[4] The Court went on to hold that it was proper for the District Court to entertain the suit in the federal court ". . . and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment." The Court's prior decision in United States v. Bank of New York & Trust Co., 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936) in which an injunction had been denied, notwithstanding the presence of the United States as a party, was distinguished on its facts. There, it was pointed out, the United States was one of many claimants to a fund and was not different from any other litigant. However, in treating the United States differently in *Leiter* it was emphasized that the policy (of exempting the United States

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[4] The reasoning of the Court was:

There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283, 28 U.S.C.A. § 2283, alone.

352 U.S. at 225-226, 77 S.Ct at 290-291.

from the anti-injunction statute) is more compelling where the United States seeks to advance a national interest.[5]

[4] The presence of the United States as a plaintiff seeking to establish rights which have a national and sovereign character is then a factor which militates strongly against the applicability of abstention.

[5] Finally, the counsel for the appellees urge that the Supreme Court's decision in United States v. District Ct., County of Eagle, Colo., 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971) justifies the trial court's decision to abstain. We have carefully considered this case and we are of the view that it does not consider the problem which is presented in the case at bar. The United States there sought through writ of prohibition in the Colorado Supreme Court to prevent the District Court for Eagle County, Colorado from asserting jurisdiction over it. This effort failed, but this case did not suggest a lack of jurisdiction of the federal district court in a federal district court in a suit instituted by the United States. Nor did it hold that the state court by virtue of § 666 had exclusive jurisdiction. Further, it did not hold nor even suggest that

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[5] The opinion distinguishes the situation where the United States is "like any private claimant":

Moreover, the Bank of New York case presented the more unusual situation where the United States, like any private claimant, made a claim against funds that it never possessed and that were in the hands of depositaries appointed by the state court. In this case, a private party is seeking by a state proceeding to obtain property currently in the hands of persons holding under the United States; the United States is seeking to protect that possession and quiet title by a federal court proceeding. Therefore, since the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state litigation has the elements of an action characterized as quasi in rem. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in the federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment.

352 U.S. at 227-228, 77 S.Ct. at 292.

abstention by a federal court, the jurisdiction of which had been invoked, should be ordered.[6]

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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[6] The Court was careful to note that reserved water rights of the United States "are federal questions which, if preserved, can be reviewed here after final judgment by the Colorado court." 401 U.S. at 526, 91 S.Ct. at 1003.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-4497

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Defendants.
AKIN, MARY, et al.,

Reporter's Transcript of Court's Ruling

Proceedings before the HONORABLE SHERMAN C. FINESILVER, Judge, United States District Court for the District of Colorado, beginning at 2:00 p.m. on the 21st day of June, 1973, in Courtroom D, United States Courthouse, Denver, Colorado.

APPEARANCES

DONALD W. REDD, Esq., Department of Justice, Washington, D.C. and KENNETH J. BURKE, Esq., United States Department of Justice, Denver, Colorado.

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PROCEEDINGS:

THE COURT: The record should reflect that we are proceeding in Civil Action 4497, United States of America vs. Mary Akin, et al. Starting with plaintiff's counsel, the Court would ask you to stand, and give us your name and who you represent, please.

MR. REDD: Donald W. Redd, from the Department of Justice representing the United States, Your Honor.

MR. BURKE: Kenneth J. Burke, United States Department of Justice, Denver, Colorado, representing the United States.

MR. BUSH: John Bush, Deputy Attorney General on behalf of the State Board of Agriculture and Colorado Game and Fish Department.

MR. SAUNDERS: Glenn G. Saunders, City and County of Denver, Board of Water Commissioners.

MR. BALCOMB: Kenneth Balcomb, Colorado River Water Conservation District and James D. Geissinger, Special Assistant to the Attorney General in connection with the Game and Fish and Department of Agriculture.

THE COURT: Mr. Moses?

MR. MOSES: Raphael Moses, Special Assistant to the Attorney General for the Game and Fish.

THE COURT: Who are some of the representatives for the Water Conservancy Districts.

MR. BEISE: Charles J. Beise, Southeastern Colorado Water Conservancy District and co-counsel for the Mancos Water Conservancy District.

MR. PASCOE: Monte Pascoe with John Rogers also co-counsel for the Mancos Water Conservancy District.

MR. HOLME: Howard K. Holme, Southwest Colorado Water Conservancy District and co-counsel for the Mancos Water Conservancy District.

THE COURT: Any other gentlemen who have—

MR. HARRISON: David Harrison with Mr. Moses who is representing the State of Colorado and the Special Attorney General.

THE COURT: The Court is considering this matter as a Motion to Dismiss. The Court has been favored with very extensive briefs on the legal issues and the respective contentions. As this Court sees the posture of this case, this is a civil action filed by the United States in order to have its rights and the rights of the Ute Mountain Ute and the Southern Ute Indian tribe in and to the waters of the Mancos, the La Plata, Animas, Florida, Los Pinos, Piedra, Navajo, and San Juan Rivers and waters tributary thereto in the State of Colorado determined and declared. The jurisdiction of this Court is invoked under 1345 of Title 28 of the United States Code. The action lists between a thousand and fifteen hundred defendants in the case depending on what time of day you make the counting and to what degree you figure some of the names. The defendants also include other unknown claimants of interest to the water in these rivers and tributaries.

The Court's inclination is to apportion half an hour

a side. Mr. Bush, do you feel this is sufficient for the defendants to apportion to them?

MR. BUSH: If the Court could afford us a little more time, maybe forty minutes. There are only two that are going to argue.

THE COURT: Well, the Court will extend that to forty minutes a side, please, as the case might be.

Is this agreeable to you?

MR. REDD: The thirty minutes will be ample for us, Your Honor.

THE COURT: The Court will extend to the defendants forty minutes. The Court will entitle the plaintiffs the same period of time.

Mr. Bush, would you proceed, please.
(Argument by counsel.)

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THE COURT: This matter comes before the Court on the Motions to Dismiss or Reconsider in regard to—as filed by the defendants or intervenors in this case. Particularly, the defendants contest the jurisdiction of this Court to entertain the instant action and in any event, the defendants submit in general that the federal government should be compelled to proceed with this action in Division 7 of the state court or in the state courts.

The jurisdiction of this Court is purportedly invoked under Section 1345 of Title 28 United States Code. The plaintiff views this action as a suit in which the United States seeks to have its rights and concomitant priorities and the rights of the Ute Mountain Ute and the Southern Ute Indian tribes in and to the use of certain waters in the State of Colorado determined and declared.

The water in question is situated in the State of Colorado as described. At this time there are approximately 1,200 named defendants in this suit.

The Court views the following as the applicable law and statutes. First, the McCarran Amendment passed in 1952 designated as 43 United States Code Section 666 which provides for the joinder of the United States in a state court suit for the adjudication of water rights. Further the Water Rights Determination and Administration Act of 1969, Colorado Revised Statute 1963, Section 148-21-1 and other sections which provides a system for the adjudication of the waters of the natural streams in the State of Colorado. Also of considerable import is the case of *United States vs. Eagle County,* 458 P.2d 760, 169 Colo. 555 which was affirmed by the United States Court, 401 United States 510, 91 S.Ct. 998, 28 L.Ed. 2d 278. Also the companion case, *United States vs. District Court in and for Division No. 5,* 401 U.S. 527.

A pivotal issue involved herein and one which is worthy of comment is the McCarran Amendment and its underlying intent coupled with the decision of the Supreme Court in the Eagle County case determined that the adjudication of such matters, that is rights of the United States to the use of state waters, is solely a matter of state jurisdiction to the exclusion of the federal courts. This issue of jurisdictional exclusivity was not decided in the Eagle County case in the opinion of this Court or its companion case. Rather as we view these two authorities, the state court had jurisdiction under the McCarran Amendment and that 43 United States Code Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within the particular state's jurisdiction regardless of how the rights were required.

However, the nature and posture of this suit in the view of the Court does not necessitate that this Court make a determination as to the exclusiveness of jurisdiction of this matter. Rather the Court finds that the State of Colorado has a well defined, workable system for adjudication of water rights of all claimants; that the United States is not immune from suit in the state courts and the United States, as it is presently doing in other water rights suits in the state courts of Colorado, apparently the United States has filed claims in Divisions 4, 5 and 6, should initiate action in the appropriate state court.

Further the Court also notes that the United States has either been served or is in the process of being served in Water Division 7, the district in which adjudication of the instant rights are located.

Although the intention of the McCarran Amendment and the Supreme Court decisions on the matter of exclusive jurisdiction are not manifestly clear, they nonetheless point out to our satisfaction that deferral of jurisdiction to state courts is justified when, as a practical matter, retention of federal jurisdiction on some claims would result in a piecemeal solution of a larger problem.

The Court perceives a practical approach in this case. Aside from the strict legal interpretations, the Court envisions that a practical approach must recognize that we would be creating a dual system of administration and decrees of water rights and potentially could require water users needlessly to readjudicate rights already decreed under state law. These water users have proximity to state courts and from a distance factor alone, there are practical impediments to requiring everyone in this particular area to litigate the matter in the federal courts.

Further the Court is satisfied from a practical approach that this would be perhaps an unreasonable burden

placed upon the citizens of Colorado and in attempting to locate individual water rights that the forums that are established through the state are recognized as a workable network of administration with considerable expertise under a body of state law that has been a hundred years in development and perhaps the system of priorities and propositions runs parallel to the history of the state and in fact is engrained in the Colorado Constitution. The Court can see no practical argument in having or persuasive argument in having another forum exercise jurisdiction.

The question that has also been presented is that perhaps the federal courts are best equipped to interpret and adjudicate federal law. However, we are satisfied that the federal courts are not the only forums under the obligation to enforce federal law. In our opinion, we should entertain jurisdiction only after the state court with its well defined expertise and considerable embodiment of law over the years, have had the opportunity to address itself to the issues inherent in this litigation. We have the question of comity between the courts. This is intertwined with the question of abstention. As we view it, comity is based on the discussion that the state can adequately vindicate federal rights and when this assumption proves incorrect, the federal courts may then act in a proper case and under applicable constitutional and federal law.

The Court for a totality of the reasons expressed under the doctrine of abstention or by comity in recognition of the presence of applicable and workable state law, we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the Indian tribes or any other individual litigants. To this end the Court is granting the defendants' Motion to Dismiss.

The Court reserves unto itself discretion and jurisdic-

tion to enlarge this opinion in this bench ruling as necessary within the period of 30 days and no appeal period will commence running until the end of that period. So it will not be necessary for the plaintiff, United States, in this case to file any Notice of Appeal. The Court will reserve unto itself a 30 day period in which to enlarge or modify this opinion. This does not mean that the Court, in fact, will do so. However, the Court will not consider this as a final judgment during this 30 day period.

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(Court in recess.)

REPORTER'S CERTIFICATE

I, E. J. CARPENTER, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under my supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colorado, this 17th day of July, 1973.

My Commission expires December 4, 1973.

E. J. Carpenter
Official Reporter